BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Connie Wight dated September 28, 1988 alleging discrimination in employment on the basis of sex, family status, and handicap.

B E T W E E N :

Ontario Human Rights Commission

- and -

Connie Wight

Complainant

- and -

Office of the Legislative Assembly

Respondent

DECISION

Adjudicator : Loretta Mikus

Date : 13th July, 1998

Board File No: BI-0047-93

Decision No : 98-013

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Sharon Ffolkes Abrahams, Counsel
Connie Wight, Complainant	)	On her own behalf
Office of the Legislative Assembly, Respondent	)	William Hayter, Counsel
Ministry of the Attorney General, Intervenor	)	Dennis Brown, Counsel

By complaint dated September 28, 1988 the Complainant, Connie Wight, alleged that her right to equal treatment in employment without discrimination because of sex, family status and handicap had been infringed in contravention of Section 4(1), 8, 10, 11, and 16 (1a) of the *Code*. Her complaint alleged that she had been discriminated against on the basis of family status because she was dismissed for refusing to return to work when ordered until she had secured adequate day care for her children. She alleged that she had been discriminated against on the basis of handicap because she was denied short term sickness benefits, maternity leave and extended leave. She was experiencing a high risk pregnancy and, as a result, delivered her baby before she had completed the service requirement of one year. She alleged that her disability could and should have been accommodated by the Office of the Legislative Assembly. The allegation of discrimination also applies to the decision of the Respondent to extend her probationary period by six months because she was off for an extended period of time as a result of her pregnancy.

At the commencement of the hearing the Commission sought leave to amend the complaint by adding an allegation of harassment under Section 7(2) of the *Code*. In a decision dated August 23, 1994 the complaint was amended accordingly.

THE FACTS GIVING RISE TO THE COMPLAINT

The Office of the Legislative Assembly is a creation of the Legislative Assembly which performs for the Legislature the task of engaging and supervising its employees. It was created under the *Legislative Assembly Act,* R.S.O. 1990, c.L.10. Prior to its enactment, the employees of the Legislative Assembly were assigned from the Public Service of Ontario and were subject to the *Public Service Act,* R.S.O. 1990, c.P.70.

The relevant provisions of the *Act* are as follows:

> 76. The Office of the Assembly shall consist of the Speaker, the Deputy Speaker, the Clerk of the Legislative Assembly, the First Clerk Assistant, the Sergeant-at-Arms, the Director of Administration and such other employees as may be required from time to time for the proper conduct of the Office of the Assembly.

87(1) There shall be a Board of Internal Economy composed of,

(a) the Speaker, who shall be the Chair;

(b) 3 commissioners appointed by the Lieutenant Governor in Council from among the members of the Executive Council; and

(c) 3 commissioners appointed

(i) one from the caucus of the Government, by that caucus,

(ii) three commissioners appointed, one from the caucus Official Opposition, by that caucus, and

(iii) one from the caucus having the third largest membership in the Assembly other than a party referred to in some clauses (i) and (ii), by that caucus, and the name of each person appointed shall be communicated to the Speaker within ten days after being appointed.

90. The Board of Internal Economy has the power and duty,

(a) to review estimates and forecasts, analysis of revenues, expenditures, commitments of other data relating to the Office of the Assembly and to assess the results thereof;

(b) to approve the organization and staff establishment for the Office of the Assembly;

(c) to approve and review administrative policies and procedures in relation to the operation of the Office of the Assembly;

(d) to advise upon all matters relating to the management, administration, accounting and collection and disbursement of money associated with the Legislative Assembly Fund;

(e) to advise upon the retention and disposal of records except cancelled cheques; and

(f) to advise upon and give direction in relation to any matter the Board considers necessary for the efficient and effective operation of the Office of the Assembly and, if considered desirable, it may report of such matters to the Legislative Assembly.

92 (1) Subject to the approval of the Board of Internal Economy, the Speaker may,

(a) establish job classifications and salary ranges;

(b) provide a system of cumulative vacation and sick leave credits for regular attendance and payments in respect of such credits;

(c) provide for the establishment of plans for group life insurance, medical-surgical insurance or long term income protection;

(d) provide for the granting of a leave of absence, and

(e) prescribe any other terms and conditions of employment, for employees of the Office of the Assembly.

92 (2) The employees' benefits applicable from time to time to the Public Servants of Ontario with respect to the matters referred to in Clauses (1) (b), (c) and (d) apply or continue to apply, as the case may be, to the permanent and full-time employees of the Office of the Assembly until a plan or system in relation to the same subject matter is provided by the Speaker under this Act, and where any such benefits are provided for in the regulations made under the *Public Service Act*, the Speaker or any person authorized in writing by the Speaker may exercise the powers and duties of a Minister or Deputy Minister or of the Civil Service Commission under such regulations.

EVIDENCE FOR THE COMPLAINANT

The Complainant worked at the Office of the Legislative Assembly as a research officer with the Legislative Research Service at Queen's Park. She was initially educated as a nurse, received two subsequent degrees in sociology and, at the time of the hearing, was a doctoral candidate in sociology at York University. She had worked at the Registered Nurses Association of Ontario as a coordinator in professional services, which included the interpretation, promotion and communication of the RNAO positions on entry to practice. Prior to that, from November of 1983 to July of 1985, she had been appointed to the Manitoba Day Care Staff Qualifications Review Committee in Winnipeg. At the time a major overhaul by the Manitoba Government of day care legislation was being done and she was part of the Committee that received submissions from various interested groups to attempt to determine the minimum educational qualifications for day care workers. The Committee categorized workers on a scale of least well qualified to

university degree with an Early Childhood Education component. The committee established the standards of day care in the province, contributed to the revision of the law and oversaw the development of the classification mechanism for day care requirements. She had also been involved in the provision of day care as a parent and had been chairperson of the Margaret Fletcher day care centre at the University of Toronto, chairperson of the parent board at the Brandon University Day Care Centre in Manitoba and was currently the chairperson of the day care institute her daughter was attending.

On March 9, 1987 she attended an orientation meeting for new staff and, on March 16, 1987, formally signed her contract of employment and swore an oath of allegiance. Her contract of employment provided for a probationary period of one year beginning on March 16, 1987 and she was classified as a General Professional P.M. 16-17. She was hired as a sociologist specializing in the area of health and day care. Among her coworkers, there were lawyers, environmental study graduates, economists and others with specialized areas of expertise whose responsibility was to provide research assignments in response to requests by members of the Legislative Assembly. They acted as advisors and consultants to the various parliamentary committees of the House and gave oral briefings to the members of the Legislative Assembly on request. Typically background research information would be provided by the librarians of the Legislative Assembly and the research officer's task was to provide factual and descriptive information about that topic. When the legislative research service was less busy and the House was not in session, there were current issue papers which provided substantial background information to members of the House when necessary.

When the Complainant was hired she reported directly to Ms. Cynthia Smith, the Director of the Legislative Research Services and Mr. Bob Gardner, who was the Assistant Director. They, in turn, reported to Mr. Brian Land who was the Director of the Legislative Library. She received her first performance appraisal for the period March 16 to June 16, 1987, which was excellent in all respects. She was graded at a performance level of superior or exceeding requirements in most areas and her overall performance assessment "was excellent". The potential for

development was good and she was praised for her ability to adapt well. It was noted she possessed superior interpersonal skills, an excellent sense of humour and knowledge of health policy and day care issues. The appraisal noted that she monitored fields outside of her area of expertise and was gaining increased knowledge of the political process. Her next performance appraisal for the period June 16 to September 16 again rated her at a superior or exceeding requirements in most areas level. Her overall performance assessment was excellent, potential for development was good and, again, it noted that she continued to develop her research skills and broaden her range of expertise. She was again praised for her superior interpersonal skills, particularly in working with her colleagues. She was noted as being sensitive and conscientious and her organizational skills had improved greatly. The performance appraisals were signed by Ellen Schoenberger, the Director of Human Resources for the Legislative Assembly. The Complainant noted on that performance appraisal the following:

> I am very pleased to be part of this unit. The work environment here is very challenging intellectually and fast paced. Both Mrs. Smith and Mr. Gardner recognize this and are sensitive to our stress levels in a positive supportive way. They are both thoughtful and give thorough advice. It is very nice to work in a place where one is commended for work well done and treated in a respectful manner.

While those comments were true at the time, the Complainant testified that Ms. Smith's and Mr. Gardner's attitude to her and treatment of her changed significantly in the fall of 1987. Indeed the next notice of performance appraisal from Ms. Smith is dated January 26, 1988 and was entitled "deferral of final performance appraisal of Connie Wight and consequent delay in her appointment to permanent staff." That memo stated as follows:

> Perhaps because of Connie's high risk pregnancy, the quality and quantity of her work declined dramatically in the period from September to December, 1987. Her subsequent hospitalization at Women's College Hospital in early January, where she will likely remain until her child is born, has made it impossible to conduct a performance appraisal at this time.
>
> In order to be fair, I wish to defer final performance appraisal and appointment to permanent staff until 4 to 6 months after she has returned from maternity leave.

It was the Complainant's opinion that Ms. Smith's attitude to her changed after September 15, 1987 when the Complainant advised her that she was experiencing a high risk pregnancy. According to the Complainant, Ms. Smith and Mr. Gardner became much more critical of her work, which the Complainant found very stressful.

At that meeting on September 15, 1987, the Complainant told Ms. Smith that she was experiencing a high risk pregnancy that she had encountered difficulty in becoming pregnant, problems during her previous pregnancy and a premature birth six weeks prior to term. She told Ms. Smith that she was very afraid that similar problems might occur with this pregnancy . Ms. Smith advised the Complainant that she had also suffered high risk pregnancies in the past and a recent miscarriage. She discussed her hopes about having another child and they discussed various health and fertility problems. Because her anniversary date and delivery date were the same, she asked Ms. Smith how she could reach a year of service if she should have a premature birth. Ms. Smith told the Complainant that she would talk to Ms. Schoenberger and later that day put excerpts from the Manual of Administration about maternity leave in her mail box. On that date the Complainant also advised Ms. Smith that she was not prepared to use the video display terminals unless she was provided with a screen. At the time there was considerable controversy about problems for pregnant women with the new display terminals. A few days later, in a discussion with Bob Gardner, she asked him whether he had spoken to Ms. Schoenberger about her service date. He said that he, Ms. Schoenberger and Ms. Smith had discussed the matter and that there would be no problem using the Complainant's holidays to help her reach her anniversary date. He advised her to contact Ms. Karin Scotland to clarify the issue. When she did, Ms. Scotland told her that she could use 15 days of vacation and 5 MCO days plus any other days that she could save in 1987 to bridge any gap that might occur between her delivery date and her anniversary date. MCO days refer to a Management Compensation Option that allows employees to use up to five days a year in lieu of overtime.

The Complainant explained that she had been having trouble getting pregnant and began seeing a fertility specialist, Dr. Phillips, in September of 1986 following two years of treatment by her

general practitioner. Dr. Phillips prescribed a number of medications and conducted a number of tests. The Complainant monitored her temperature and ovulation cycle and, as a result, knew very quickly in June of 1987 that she was pregnant. Because she had a history of ectopic pregnancy, she had an ultrasound on July 16 where it was discovered she had a normal intrauterine pregnancy. As a result her pregnancy was confirmed on that date. The Complainant saw Dr. Phillips on September 10, 1987 when he advised her that she was a high risk pregnancy because of her infertility problems and that she would have a very medicated and highly interventionist delivery. That upset her and she decided to return to the South Riverdale Community Health Centre and her general practitioner, Dr. Chu, and nurse practitioner and midwife, Ms. Maryanne Cheetham. The Complainant continued seeing them until November of 1987 when problems with her pregnancy became more serious and she began to see Dr. Zaltz. Her problems with her pregnancy were, in her view, as a result of the considerable stress she was suffering at work. Shortly after she discussed her high risk pregnancy with Ms. Smith, she and Mr. Gardner became very critical of a particular paper she was working on at the time and that criticism continued with subsequent assignments. Sometime between the end of October and the beginning of November she was called without notice into Ms. Smith's office. Mr. Gardner was there as well. They were both very critical of her work and her attendance at work. They commented on the fact that she was late for work every day. The Complainant explained that she arrived at work ten minutes late because she had to drop her son off at school and then walk to the office. They criticized the fact that her work was late and that the work she provided to the secretaries was, according to Mr. Gardner, confused and disorganized and the secretaries were resentful of the amount of work and the quality of the work that they were expected to do. Because the Complainant had refused to work with the video display terminals, she was unable to input her own work on a computer which normally would have allowed her to present her data and the arrangement of that data in a readable form. She was unable to do that and, as a result, the work she provided to the secretaries was not as organized as it has been. The Complainant explained that she was providing information to the secretaries by writing it out by hand or by cutting and pasting revisions. She also suggested to Mr. Gardner that because he had changed his conception of the education issues paper, she had experienced problems in writing it in the way he wanted.

He wanted large sections of it moved, which was problematic because the Complainant was not using the VDT.

Following that meeting the Complainant advised Dr. Chu and Ms. Cheetham that she was under a great deal of stress at work and that her employer was hostile and unsupportive. They provided her with a letter advising the Respondent that she was 21 weeks into her pregnancy, her expected date of delivery was March 16, 1988, her pregnancy was high risk and she was being monitored closely. The medical notes of Ms. Cheetham, dated October 28, 1988, averted to the fact that, while the Complainant was physically well, she was tired and "work stress plus, plus, plus, boss not understanding, people at work telling her at work she was not big enough." That reference is to an alleged remark made by Ms. Smith which upset the Complainant. She had not gained much weight during her pregnancy and Ms. Smith commented to her on the fact that she could continue to wear her regular clothes and did not need maternity clothes. The Complainant considered that remark to be hurtful.

It was the Complainant's evidence that her work load increased after Ms. Smith was advised of her high risk pregnancy. From March 16 to September 15, 1987, the Complainant had been assigned a total of 9 projects. Between September 15 and the time that the Complainant went into the hospital in January of 1988 she was assigned 11 projects. Those projects were as follows:

March 17	-	School drop out rates education policy responses
March 23	-	Comparison of Government operated insurance in Manitoba, Saskatchewan and B.C.
April 3	-	Pet food regulations
April 21	-	Analysis of Bill 8, the French Language Services Act
May 6	-	Transit leave problems in N.W. Ontario
June 3	-	Education, basic literacy
June 4	-	Morgentaler Clinic

June 8	-	Disposition of cremated remains
July 6	-	Current issue paper - education
July 8	-	Drop-out rates in Ontario
Oct. 7	-	Current issue paper on insurance
Oct. 14	-	Elementary school strikes
Oct. 26	-	Current issue paper on French Language Services Act - this was ultimately cancelled but before it was the Complainant did considerable work on it
Nov. 4	-	Demographic data - riding of Etobicoke West
Nov. 6	-	Local availability of potential provincially owned sites for day care centres
Nov. 10	-	Employment rights of epileptics
Nov. 16	-	Briefing notes estimates of the Ministry of Health - estimates - that project was subsequently taken over by Ms. Alison Drummond, the research officer who replaced the Complainant
Nov. 23	-	Background Auto Insurance Review Board
Dec. 2	-	Education of adults, fight against unemployment

In summary, the Complainant's evidence was that between March and July of 1987 she was assigned ten projects and between October and December of 1987 she was assigned another eleven.

Not only was the Complainant's work load the same if not greater than it had been before she advised the Respondent of her high risk pregnancy, at the same time the Complainant contacted a flu virus. She felt that she could not take time away from work because of the criticisms about her work and forced herself to continue to work through the flu to complete one of the research papers. It was her belief that the flu compounded her problems with her general health because

it was about that time that she noticed that the fetus seemed to stop moving. On November 9, 1987, the fetus seemed to engage in her pelvis and she began to become concerned about a premature birth. She told Ms. Smith on November 12, 1987, that she was very concerned about her health and Ms. Smith suggested that the Complainant see her doctor. The Complainant did and it was suggested that she return to her own obstetrician because her cervix was already starting to efface. She went back to see Dr. Chu and ended up in the hospital in emergency on November 17, 1987, when she saw Dr. Zaltz. When she saw him on November 17, 1987, she was experiencing contractions and was having a great deal of pressure in her perineum. It felt as if she was going into labour and the only thing that seemed to stop the contractions was for her to lie on the floor with her feet elevated. The following week when she went to see Dr. Zaltz those symptoms had disappeared. She had an ultrasound done at the time and he advised her to return to work but to be cautious of her activities and to see him the following week.

Between November 23, 1987 and January 4, 1988, there were no significant incidents or events involving her pregnancy. When she saw Dr. Zaltz on January 4, 1988, he discovered that she was in active labour, having contractions and was three centimetres dilated with a fully open cervix. She was admitted to the hospital on complete bed rest. She was still ten weeks away from her expected date of delivery. She was placed on complete bed rest and given oral medications to stop the labour. An ultrasound showed that the fetus weighed 2.2 pounds. She was under considerable stress at the time as a result. She called Cynthia Smith on January 4, 1988, to tell her that she had been admitted to hospital and that she would not likely be returning to work for the duration of her pregnancy. She explained to Ms. Smith that she was attempting to prevent the birth of her child. Ms. Smith asked her when she thought she would return to work and the Complainant said the earliest would be October of 1988 and the latest would be January of 1989.

On January 11, 1988, she received a package of information from Ms. Schoenberger dealing with maternity leave without pay. In the accompanying memo Ms. Schoenberger advised the Complainant that employees with less than one year of service were not eligible for maternity leave or supplemental unemployment benefit allowance (SUB). She was however entitled to make

application for 17 weeks of a maternity leave without pay and without the accumulation of credits. The memo asked the Complainant to complete, sign and date the attached application for leave without pay and to return it to Ms. Schoenberger as soon as possible so that the Clerk of the House could authorize her absence. The attached form was a request for a leave of absence that read, in part:

> "I wish to take maternity/without pay/leave from January 4, 1988 to May 1, 1988 (17 weeks).

The form was dated January 11, 1988, and signed by Ms. Schoenberger as approved. Written at the top of the form was "sign both copies and return, when approved I'll send you back. K.S."

Prior to receiving that memo the Complainant had a discussion with Ms. Scotland in which Ms. Scotland advised her that she would be required to commence maternity leave without pay. When she received the memo from Ms. Schoenberger she was very upset. In her view, at the time she was in hospital trying to prevent a premature birth. Any suggestion she should be on maternity leave was very upsetting to her. Accompanying Ms. Schoenberger's letter was a one page document setting out the maternity provisions for management and non-union employees. The Complainant had seen the document before and knew that it was incomplete. She contacted the Ministry of Government Services' counselling department, who provided her with the sections of the Manual of Administration that contained the complete maternity leave and the sick leave provisions. Also accompanying the documents was an agreement to continue benefits while on leave without pay, noting the selection of benefits the Complainant wished to continue. The policy required that she be responsible for paying for them herself if she wanted them to continue.

The Complainant was contacted several times while she was in the hospital by Ms. Scotland, who repeatedly requested that she return the forms. The Complainant advised her that she was not going to return that particular form and that she was requesting sick leave. The Complainant testified that Ms. Scotland was upset with her but she persisted and provided Ms. Scotland with

a letter from her doctor on February 7, 1987, that stated that the Complainant was currently unable to work due to pregnancy complications and was hospitalized because of an incomplete cervix. The note further stated that the Complainant would be unable to return to work prior to the birth of her child. On the Complainant's accompanying letter was written the following:

> E.
> Since the doctor states clearly that her illnesses due to pregnancy complications she would not qualify for STSP. If in doubt we should send it to John Laberge and ask for his opinion in writing.
> K.S.

In a memo dated February 24, 1988, Ms. Schoenberger thanked the Complainant for her doctor's letter of February 2, 1988, and advised her that they had obtained an opinion from Mr. John Laberge, Senior Advisor of the Benefits Policy Branch, Management Board of Cabinet. His opinion was attached to the letter. The memo also went on to note that in order to have a leave approved by the Clerk of the House, the Complainant had to return her Request for Leave form, signed and dated, as soon as possible, as well as the document about the continuation of benefits. On the bottom of that memo was a hand written note by K.S. dated January 21, 1998 which stated:

> E.
> I called Connie today and asked her when I would receive her papers. She said she would call you today.

Included was the telephone number of Women's College Hospital.

Attached to the letter was a memo from Mr. Laberge which set out Section 65(1) of the *Public Service Act* as well as an excerpt from the Manual of Administration, Supplement to Volume 2(Section 5-8-4). It stated as follows:

> The absence of a pregnant employee, due to illness or injury prior to the commencement of or following maternity leave, may be charged to the Short Term Sickness Plan providing an employee is prevented from performing her duties due

> to illness or injury and there are days remaining in the employee's Plan. Where a doctor recommends that a pregnant employee remain at home as a preventative measure prior to the date her maternity leave is to commence, but where there is no illness involved, benefits under the Short Term Sickness Plan do not apply.

The memo went on to state that since there was no illness involved, and the Complainant was remaining at home as a preventative measure, the Short Term Sickness Plan (STSP) did not apply.

The Complainant wrote to Ms. Smith on March 1, 1988, requesting maternity leave in accordance with the provisions of the Ontario Public Service (OPS) to begin on March 16, 1988. Attached was a note confirming the estimated date of delivery. Written on the bottom of that memo dated March 7, 1988 was the following:

> Talked to Connie, telling her to send in papers re: her LWOP and that she was away without authorization. She told me she will apply for discretionary. leave and wouldn't sign the papers I sent her since it says Maternity Leave Without Pay on them. When I told her she is jeopardizing her position not applying for a proper leave, she hung up on me.
>
> K.S.

There were two additional notations in handwriting, one dated March 8, 1988 and the other March 9, 1988 stating that a message had been left on the Complainant's answering machine. The Complainant took notes of the telephone conversation on March 7, 1988 with Ms. Scotland in which she was advised that she was jeopardizing her position since she was away without authorization, Ms. Scotland suggested that the phoning "back and forth" was not getting them anywhere and that if she did not get permission for the leave the auditors would "find something wrong." The phone message left on March 8, 1988 by Ms. Scotland reiterated that previous conversation. Ms. Scotland advised the Complainant that Ms. Schoenberger wanted to see something in writing from her asking for a "discretionary or whatever" leave. She repeated that it was important they straighten out the matter "since you cannot ask for discretionary leave two months after the fact".

On March 9, 1988, the Complainant sought advice from two lawyers in the Research Service Department on how to protect herself with respect to her request for a maternity leave of absence. On the basis of their information she completed the leave request by crossing out all references to the type of leave so that the first paragraph of the memo read "I wish to take leave*** from January 4, 1988 to March 15, 1988". The next paragraph stated that if she was unable to return on the above date she would notify her supervisor on March 1, 1988 regarding her request for maternity leave beginning March 16, 1988. She also typed onto the form the following:

> ...I'm completing this form as I was advised on March 7, 1988 by Karen Scotland, Benefits/Personnel Officer/Human Resources Branch, Legislative Assembly, that if I do not do so, I will "jeopardize my job." I am doing this without prejudice to my right to appeal the denial of sick leave.

She also returned the agreement to continue benefits while on leave without pay with a similar notation. Accompanying that was a letter to Ms. Schoenberger setting out the history to date of her situation, and repeating her request that, pending an appeal of Mr. Laberge's interpretation, the time spent in hospital and at home be regarded as a leave of absence. Written on that memo was a notation by K.S. confirming Mr. Laberge's opinion that the Complainant was not entitled to maternity leave.

During her stay in hospital the Complainant was referred to a psychiatrist, Dr. Januszewska. At the time she was under a great deal of stress because of her pregnancy. She was on complete bed rest in a four bed unit on the high risk pregnancy ward. One of the women admitted to the room had given birth to premature twins at 22 weeks and both of her twins died two days apart. It was very stressful for the other women in the room who were attempting to prevent premature birth to deal with this woman's tragedies. As well, the woman had numerous guests and flowers which triggered the Complainant's allergies. She was moved to another room the next day but, while she was there, it was very stressful for her. At the same time someone was telephoning the room and breathing heavily into the telephone. At one point this person telephoned the room and one of the other women thought it was her husband and spoke to him for some time until she realized that it was, in fact, an

obscene call. During this time, the Complainant was trying to come to terms with the fact that she could have a premature baby. It was difficult for her to consider dealing with a two pound baby in an intensive care unit. The telephone calls she kept getting from the Respondent added to that stress. She testified that it was hard enough to be on complete bed rest and trying not to move so as to precipitate a contraction and at the same time, dealing with her employer regarding benefits and forms. She attended a group session with several other women experiencing high risk pregnancy and during the group discussion became quite upset. The social worker who was at the session came to speak to her afterwards. The Complainant discussed her anxieties about a premature birth and about the harassment that she felt she was being subjected to because of her request for sick leave and maternity leave. Even at the hearing she found it very stressful to discuss it.

On March 22, 1988 the Complainant wrote to Ms. Smith advising her that she had given birth on March 10, 1988, four working days before her anniversary date of March 16, 1988. She requested to use four of her accumulated holiday days to bridge the time to her anniversary date, which would then entitle her to maternity and SUB benefits. The note went on to say:

> "In September, when I notified you, I consulted K. Scotland about using holidays to get to the anniversary date in case I had a second premature birth. Ms. Scotland assured me that I could readily elect to use my holidays to get to the anniversary date. She encouraged me to bank some from last year (1987) in case I needed to use them--which I did.

On that memo was written a notation "info given by Ms. S. was different." That handwritten note was signed by E.S.

Another notation in handwriting on that memo stated "I do not recall this conversation. Nobody knew until November that Ms. Wight was pregnant." That memo was dated March 24, 1988, and was signed by K.S.

On March 29, 1988 the Complainant received a letter from Ms. Schoenberger advising her that the Clerk had approved her request for discretionary leave without pay on the understanding that

she would be on probation for a year after her return to work. The memo noted that it was customary to extend probationary periods by at least the length of a person's absence, if it falls in the probationary year. Attached to that memo was a copy of the request for leave of absence form previously signed by both Ms. Schoenberger and the Complainant. The first paragraph that the Complainant had completed stated as follows: I wish to take leave...from January 4, 1988 to March 15, 1988. The form provided to the Complainant with that letter stated:

> I wish to take discretionary leave without pay from January 4, 1988 to as required (baby has been born on March 10, 1988).
> E.S.

At the bottom of the memo was a notation by Ms. Scotland that Ms. Wight had been put on one year's probation from the date of her return to work and another notation that stated the maternity benefits were not applicable to her. The Complainant was very surprised and upset to see the changes in her memo. She never approved those changes and, because her signature was on the document, it appeared as if she was in agreement with its terms when she was not.

The Complainant testified that all of these activities exacerbated her stress at the time. The day after she was admitted to hospital Ms. Smith contacted her to advise her that she had packed up everything in her office and placed it in a hall closet. She asked that the Complainant's spouse collect it because it was not safe in the office. The Complainant received several more calls during that month for various reasons including the completion of the leave forms. Because of the controversy over the maternity and sick leave provisions, the Complainant contacted a counsellor from government services for information about them. In early March she was still pursuing her claim for sick leave and decided that she should contact the Ontario Public Service Employees Union (OPSEU) to see if it knew of any similar cases that might help her. Mr. Terry Moore, an organizer with OPSEU, returned her call. She explained that she was home on bed rest and he offered to meet with her once she had delivered her baby and to help her prepare and present a grievance, if necessary.

She met with Mr. Moore on March 17, 1998, which prompted him to write a letter to Ms. Schoenberger. In that letter he advised Ms. Schoenberger that he would be representing the Complainant in her appeal of the denial of sick leave immediately preceding the birth of her child. He made reference to Mr. Laberge's opinion and to the Manual of Administration respecting sick leave. He took the position that the Complainant's absence was the result of an illness and, therefore, she should have been provided with benefits under STSP from January 4, 1988 until March 10, 1988. He suggested that the Respondent's position seemed harsh and counter-productive. He asserted that the stated objective of the OPS was to encourage the employment and advancement of women which directly contradicted the narrow interpretation of illness being applied in these circumstances. He advised in the letter that he had sent a copy of the correspondence to the Board of Internal Economy's official opposition representative so that the matter could be dealt with at that level, if necessary. The following day, that is March 22, 1988, the Complainant delivered her letter to Ms. Smith when they discussed her return to work. The Complainant advised Ms. Smith that the earliest she could return would be October and that, if she obtained entitlement to sick leave and maternity leave SUB benefits, including extended maternity leave, she would not be returning to work until January of 1989. At that meeting Ms. Smith's sole interest was when the Complainant would be returning to work so that she could give notice to her replacement. When the Complainant realized that Ms. Scotland was denying any prior discussion about bridging the gap between the date of delivery and an anniversary date, she was devastated. She saw Ms. Scotland's actions as a "further slap in the face."

On April 6, 1988, Ms. Schoenberger wrote to Mr. Moore advising him that the Office of the Legislative Assembly was not governed by the provisions of the *Public Service Act* or any other collective bargaining legislation. It was her view that it was inappropriate for an of the employee of the Office of the Assembly to be represented by OPSEU or any other union. She made reference to the Assembly's grievance procedure in the Manual of Administration. There was, however, no copy of the grievance procedure attached. Mr. Moore made efforts to obtain it but the Complainant was told that in order to receive a copy she would have to meet with Ms. Schoenberger. An appointment was made for April 20, 1988. The Complainant viewed the

delay in providing her with a copy of that grievance procedure as another example of harassment. She found it quite frustrating to be told that the grievance procedure was available to her and then be denied access to it for an additional two weeks.

At that meeting with Ms. Schoenberger the Complainant was advised that, having discussed the request for sick leave with Ms. Smith and Ms. Schoenberger, the next step in the process was to the Clerk. He would either approve or deny her request for sick leave and, if necessary, the Complainant could grieve his decision to the Speaker. Since the Clerk had already informed himself of the Complainant's situation by speaking with Mr. Land and Ms. Schoenberger and had read the opinion of Mr. Laberge, Ms. Schoenberger suggested that he had already had an opportunity to consider her request. Ms. Schoenberger also stated that, since the Complainant was on probation, if the Speaker allowed her request he would be setting a precedent for early maternity leave which caused her some concern.

The Complainant understood from that meeting that she was to grieve the denial of sick benefits to the Management Board of Cabinet, Human Resources Secretariat. According to Ms. Schoenberger, it was the Management Board of Cabinet which made the rules and not the Legislative Assembly. The Complainant subsequently filed a grievance with Ms. Smith alleging that she had been improperly denied sick leave benefits for the period January 4 to March 10, 1988 and improperly denied access to maternity leave. As well she grieved the unfair extension of her probationary period. In the letter of grievance she advised them that Mr. Terry Moore would be acting as her representative in her grievances. The Complainant took those grievances to Ms. Smith on April 27, 1988 and, during that meeting, they discussed the open nature of the leave requested by the Complainant. They both acknowledged, according to the Complainant, that "as required" was an uncertain date. They discussed the fact that the Complainant had applied for day care at the Queen's Park Day Care and that the earliest they could assure her of a space was October. They discussed another employee in the legislative library who had been allowed a flexible return to work date on a part-time basis until her child became comfortable with the day care centre. The Complainant expressed her hopes to Ms. Smith that she be given the same option.

On May 3, 1988 the Complainant wrote a letter to Dr. Elaine Todres, Deputy Minister of the Human Resources Secretariat. Appended to that letter was the correspondence that had passed between Ms. Schoenberger and the Complainant as well as the letter from Dr. Zaltz, the denial of her sick leave and maternity leave requests, as amended, a request for a leave of absence and Mr. Laberge's legal opinion. In the letter the Complainant explained what had happened to date and asked for Dr. Todres assistance. She received a reply from Dr. Todres dated May 27, 1988 which advised her that she had directed her staff to investigate the situation and suggested that she should meet with her personally. An appointment was made for a meeting on June 20, 1988, however, Dr. Todres was unable to attend and the Complainant met with Mr. Jim Thomas, her Assistant Deputy Minister. At that meeting Mr. Thomas advised the Complainant that he was "shocked at my letter". He then read a legal opinion that had been undertaken at the direction of Dr. Todres which reversed Mr. Laberge's earlier opinion. He apologized and admitted that they had been wrong in the opinion that was given and with respect to the actions taken subsequent to that opinion. The Complainant also asked about the bridging arrangements that had been proposed to her by Ms. Scotland but Mr. Thomas did not agree that was an appropriate method of meeting her service requirements. He suggested that the Complainant petition the Speaker for discretionary leave since the Speaker had the discretion to grant leave of absence on compassionate grounds for exceptional circumstances and that the facts of this case were exceptional. Mr. Thomas referred to the *Public Service Act*, Section 74 (3) which deals with special and compassionate considerations. They discussed the ongoing harassment and extended probationary period but Mr. Thomas was hesitant to become involved and suggested that she discuss the harassment issues with the Speaker. The Complainant subsequently received a letter dated July 8, 1988, from Dr. Todres confirming their recognition of her claim under the short term sickness plan. The letter went on to state that their review of the law indicated that sickness benefits were payable for absences attributable to a pre-existing condition aggravated by pregnancy. Dr. Todres conceded that recent cases suggested that abnormal pregnancy alone entitled an employee to sickness benefits. Dr. Todres further stated in the letter that she was recommending that "we changed the existing policy interpretation to describe more accurately the application of short term income protection to illnesses which arise during pregnancy." Dr.

Todres, however, was unable to assist the Complainant with respect to the maternity leave of absence. She stated that the only relief to the strict application of the one year requirement would be found in the discretionary authority vested in the Deputy Minister to grant paid leave on special or compassionate grounds.

The grievances filed by the Complainant were processed to the next stage, this is to Ms. Schoenberger. Ms. Schoenberger responded by denying both grievances but stated as follows:

> "As you know, the Legislative Assembly is bound by and part of the same benefit policies as are in place throughout the Ontario Public Service, and both the Legislative Assembly and the Ontario Public Service manuals of administration state: ..."

On May 20, 1988, the grievances were advanced to Mr. Claude DesRosiers, the Clerk of the Legislative Assembly. A meeting was held on June 14, 1988 and, following that meeting, the Complainant was advised that she would be granted sick leave benefits under the short term sickness plan from January 4, 1988 until March 10, 1988. However, the Clerk denied her request for maternity leave because she had not completed her first year of service. With respect to the grievance concerning the extension of the probationary period, Mr. DesRosiers noted that it was normal and the prerogative of management to extend an employee's probationary period by at least the length of any absence. He concluded by concurring with management's decision to extend the probationary period but reduced it to six months.

The final stage in the grievance process was Mr. Edighoffer, the Speaker. It was his conclusion that the Complainant had been properly denied maternity leave because she had not completed a year of service before her delivery date and that the extension of the probationary period was reasonable in the circumstances.

However, before she received the Speaker's denial of her grievances, the Complainant received a letter dated July 4, 1988 from Mr. DesRosiers advising her that the 17 week maternity leave of

absence would be completed on July 7, 1988. His letter acknowledged that he had granted a discretionary leave of absence "as required", depending on the date of the birth. The letter stated that they had kept her previous position open and extended the date of her return to July 18 at the latest. The Complainant testified that she was shocked when she received this letter. The last conversation she had with Ms. Smith on April 27, 1988 concerned her return to work in October and perhaps as late as January. Ms. Smith had made no objection at the time to the Complainant's plans.

The Complainant immediately wrote a letter to Mr. DesRosiers reminding him that the original request for leave of absence had been "as required" and that the termination of her leave on July 18, 1988 would make it impossible for her to arrange placement for her child in any day care facility. She asked for additional leave pending the decision of the Speaker respecting her grievance. Her request was also for an additional six months of leave which would mean a return to her position on or about January 7, 1989. The Complainant testified that she was simply not prepared to return to work that early. She had placed her daughter's name on a waiting list at three day care centres: namely, Queen's Park Day Care, YWCA Day Care and the Children's Circle in Riverdale. All of those applications were made in July of 1987, when the Complainant first discovered that she was pregnant. She also had contacted Victoria's Day Care Services which co-ordinated and supervised home day care services. Even though she was on four lists at the time, the most encouraging message was from the Queen's Park Day Care Centre which said that they would have space for her child in October. When the Complainant met with Ms. Smith in April of 1988 and told her about her day care arrangements, Ms. Smith said nothing that would indicate that the Complainant would have to return to work earlier than that date. When she received the letter from Mr. DesRosiers she called all of those places to see if she could get in earlier but was unsuccessful. She called other day care centres and interviewed a number of people to provide care in her home. She also sought out day care in the neighbourhood and was able to secure care from a neighbour but not until October. She interviewed five people for day care in her own home but determined that none of those people were satisfactorily trained to provide the quality care that she expected. The Complainant stated that she was very much committed to a licensed supervised day care centre.

Mr. DesRosiers responded to the Complainant's request for a six month leave of absence on July 12, 1988, as follows:

> "I regret that I will be unable to grant such a request but in view of the difficulties with which you are faced in finding suitable day care for your infant, I will extend your leave without pay until August 2, 1988. I truly hope that this additional period will help you to organize your personal affairs, permitting you to return to work. You must realize, that in the circumstances, we cannot hold your position open beyond the date of August 2, 1988."

By letter dated July 28, 1988, the Complainant advised Mr. DesRosiers that she would be unable to return to work on August 2, 1988 as requested. Her letter stated that she had been unable in the short time to provide child care for her infant and her seven year old son. She stated that she had been required to remove her son from his after school program because of her loss of income since January. She could not regain that space until January of 1989. She advised Mr. DesRosiers that she had made arrangements for day care in October and asked that her leave be extended until at least October 10, 1988.

On August 3, 1988 a letter was sent by courier to the Complainant from Mr. DesRosiers denying her request for an extension of her leave until October 10, 1988. Mr. DesRosiers stated he had given the matter a lot of thought and, while sympathetic to her needs, stated that the Legislative Library could not function under those conditions and that the duties attached to her position required her attendance. He requested that she report for work the following Tuesday, August 9, 1988. If she failed to return, they would not hold her position and a replacement would be found.

The Complainant did not report to work on August 9, 1988 as ordered. Instead she hand delivered a letter to Mr. DesRosiers which stated that the Complainant had been led to believe, after communication with Mr. Dave Cook, that Mr. DesRosiers was prepared to be flexible about her leave. She stated in the letter that she had tried to contact Mr. DesRosiers on Friday, August 4 and Monday, August 8, 1988 to discuss her return date. She was informed that he was on

vacation. She concluded by asking that he reconsider her request for an extension. The earliest that she could return to work was October 1, 1988. She attempted to give a letter directly to Mr. DesRosiers but he was unavailable and so she had left it with his secretary. Later that evening she received a letter by courier from Ms. Schoenberger that stated as follows:

> Since you did not report for work this morning as you were directed by the Clerk of the Legislative Assembly, nor called your supervisor, we are treating your position as abandoned and will proceed to fill it in due course.
>
> Please get in touch with Ms. Scotland of my office to arrange for the finalization of the necessary documents regarding pension and related matters.

She was surprised to read this letter considering that she had communicated with Mr. DesRosiers that day about her reasons for not returning. She contacted a labour lawyer who advised her to send a letter to Ms. Smith and Ms. Schoenberger clearly stating that she had not abandoned her position and that she was continuing to pursue the matters raised in her letters. In the meantime Mr. Moore had contacted Ms. Schoenberger to discuss the Complainant's termination. He asked if they would wait to act on the termination until he had had an opportunity to speak to the Complainant. A memo to file the next day from Ms. Schoenberger stated as follows:

> The Clerk informed me at noon today that C. Wight called him from out of town to discuss once more her return. Mr. DesRosiers reiterated that Ms. Wight must be back at her job. He gave her a final extension until next Wednesday, August 24, 1988. Ms. Wight indicated that this would not be possible for her and the Clerk then told her that she must be back on that date or failing that her services would be terminated.
>
> I have asked M. Dickerson and C. Smith to report to Karen Scotland of my office as to C. Wight's presence next Wednesday. Should C. Wight not personally report for work, termination papers will be processed immediately.

On August 23, 1988, the day before the Complainant was scheduled to return to work, she sent another letter to Mr. DesRosiers, restating her inability to obtain acceptable child care. She advised Mr. DesRosiers that she would be out of town until August 19, 1988, which would only

leave her one week to arrange child care. Since Mr. DesRosiers was on vacation from August 9 to August 17, 1988, the Complainant felt she had no other alternative but to wait and talk to him on August 17 about her future employment. She took issue with the reference to the comments of Mr. DesRosiers in their telephone discussion about the fact that she had not been trying hard enough to find day care. She reminded him of the lack of availability of child care, which was a matter of public debate, record and media attention. She stated that his expectation that a parent could find quality child care on one or two weeks' notice was unreasonable. The letter stated "but I made inquiries, directors of the child care agencies were incredulous that an employer would make such a request." She set out the various attempts she had made to obtain child care in the interim and concluded that the only acceptable child care she could arrange could not begin until October 1, 1988. She reminded Mr. DesRosiers of her former position involving day care for the Government of Manitoba and stated that none of the candidates she had interviewed for in-home care could meet the minimum requirements for infant care. She repeated her previous statement that the earliest she could return to work was October 3, 1988, and asked Mr. DesRosiers to consider her request "in view of the public debate and media attention regarding the unavailability of quality child care."

On August 24, 1988 the Complainant did not report for work as ordered. She was sent a letter from Mr. DesRosiers stating that, as far as the Legislative Assembly was concerned, she had abandoned her position. Two boxes containing her personal items were sent to her home by taxi and she was advised of her termination entitlements.

The Complainant grieved her termination and a letter from Mary Cornish, her counsel, to Mr. Edighoffer was dated September 19, 1988. That letter reviewed the history of the Complainant's employment and set out the issues between the Legislative Assembly and the Complainant. Those issues included the interpretation of the Manual of Administration, specifically the maternity leave policy, and allegations of discrimination on the basis of sex, marital status and handicap. The letter suggested that the Complainant would like to settle the matter internally, however, was aware that there was a time limit for filing a complaint under the *Human Rights Code*. The letter concluded by asking that the Speaker exercise his discretion in favour of the Complainant by

granting her maternity leave. If the Complainant had been granted maternity leave, she would have also been entitled to six months unpaid leave and would not have been required to return to work until January of 1989.

Following her termination she sought employment in numerous places including the City of Metropolitan Toronto, York University and the University of Toronto. She also attended at the Unemployment Insurance Commission office weekly to check the boards. She was unable however to find work with any research duties. She went back to school in September of 1989 to obtain her doctorate in sociology at York University. She decided that since she had been unsuccessful in obtaining employment, she would have a better chance if she were better educated. In the meantime she took her real estate license but, because of the slow economy, has not been particularly successful at it. As well she taught some courses at York University and applied for some of the internal postings there.

In cross-examination the complainant was referred to a consultation done by Dr. Romana Januszewska. The consultation was done as a result of the nurses' concerns about the complainant's "over reaction" to events on the unit, including the obscene telephone calls, another patient's miscarriage, etc." The reason for the consultation was "anxiety" and the diagnosis on the consulting report was "situational anxiety in obsessional pers"(personality). Dr. Januszewska described the Complainant as follows:

> Mrs. Wight is an R.N. who formerly worked at WCH and then went into work with Ministry having taken extra training and education. She is a bright and well organized woman who tends to deal with issues by intellectualization and the denial of feelings. She made a big issue of "thinking positive" and was very reluctant to explore the fact that there were any fears that the outcome of this pregnancy might be anything less than favourable.
>
> She admitted that she had taken five years to get pregnant and that this was a highly valued child. She changed obstetricians at 21 wks. because her previous obstetrician had failed to respond immediately to her concerns about diminished movement but gave her an appointment in three days.

> PT. comes from Kingston, Ont., her husband from B.C., so they have no extended family here, however she denies that this presents a problem. Because of her rather guarded attitude her past and family of origin was not explored at this point. She was given a lot of support for attempting to deal calmly with the unavoidable anxiety of having a high-risk pregnancy. She is a very tightly controlled woman and I will see her again, but will go very gently.

The Complainant recalled seeing a psychiatrist but could not remember her name. She conceded that her past history of ectopic pregnancy and premature birth created more stress during this pregnancy. She was not necessarily surprised when Dr. Phillips told her that her pregnancy would be high risk and would involve medical intervention. However, she stated that she was uncomfortable with Dr. Phillips' approach and for that reason went back to the Riverdale Community Health Centre and Ms. Cheetham and Dr. Chu. It was her hope that the pregnancy would continue without incident and that Dr. Chu would take a more conservative approach to care. She denied, however, when she spoke to Ms. Smith on September 15, 1987, that she was under any particular stress. Even at that early date, however, she had concerns about meeting her service requirement for maternity leave and it was in that context that the discussion of a high-risk pregnancy arose. She insisted, however, that, even at that time, she hoped and expected that her pregnancy would run its normal course and that her due date would coincide with her service date. She was aware of the policies of the Office of the Legislative Assembly as well as the OPS and knew that the Respondent could place her on maternity leave eleven weeks prior to her delivery, which would mean that she would only have a six week leave of absence after the delivery. Although she was aware of those policies, she believed, after her discussion with Ms. Scotland, that she would be able to bridge any gap between her delivery date and her service date by using her vacation and MCO days.

In addition to her earlier testimony about the criticisms concerning her work and the comment by Ms. Smith about her maternity clothes, she also related a discussion in late September or early October with Mr. Gardner, wherein he told her that he wanted her to complete three current issue papers: the French language services paper, the educational issues paper and the education finance paper, as soon as possible. He then walked out of the room without any further discussion. The

Complainant described him as being very officious, abrupt and aggressive with her for the rest of the year. When it was suggested that perhaps her perception of things was affected by the stress she was experiencing, she denied it. They were personally attacking her for no reason that she could understand. She conceded that at no time between September 15, 1987 and January 4, 1988, did she ever specifically advise Mr. Gardner or Ms. Smith that, because of her high-risk pregnancy, she was having difficulty doing her assignments. She also acknowledged that she never asked them to reduce her work load to accommodate her high risk pregnancy. It was her opinion that they knew that she was suffering a high risk pregnancy and should have understood that that was the cause of her problems during that time. They should have, on their own initiative, understood that she needed accommodation. She stated that it was frustrating for her because she felt that Ms. Smith and Dr. Gardner were not as sensitive about her situation as they should have been. When asked what they should have done in the circumstances her answer was "I didn't expect them to do anything different." She maintained that they refused to recognize what it meant to have a high risk pregnancy and she had expected them to be more sensitive to her situation. She also acknowledged that even after November 17, 1987, when she was in the hospital, she never asked for relief on any of her work assignments, but felt that, by putting them on notice that she might have to take sick leave if they did not reduce the stress she was under, she was making a clear request for accommodation.

She conceded that it was not unreasonable of Ms. Smith and Dr. Gardner to believe that there had been a deterioration in the quality of her work after September of 1987. She insisted however that it was not through any fault of her own. One of the criticisms Mr. Gardner made about the education issues papers resulted directly from the fact that he had changed his focus after he had assigned her the paper and as a result she had to redo much of the work that had already been done. As well, because she was unable to prepare her data on the computer, she was forced to cut and paste it and ask the secretaries to do the typing. She suggested that the secretaries had difficulty priorizing their work, which resulted in delays in the completion.

It was her view that the criticisms with respect to her late arrival at work were unfounded as well.

She explained that she had to drop her son off at his school and walk to the legislature from there. As a result she habitually arrived at work about 10 minutes late. She conceded that she had never officially spoken to Dr. Gardner or Ms. Smith about arranging for a late arrival but considered their criticisms another example their insensitivity to her problems. She also commented on the fact that they never noticed when she worked late, which was often. She had made it clear to them that she had to take her son to school in the morning and would be late. If it had been an issue with them, she would have gladly worked later in the evening to make up the time.

In late October of 1987 the Complainant discussed strategies with Dr. Chu and Ms. Cheetham for dealing with her problems at work. One of the suggestions was that she quit or work part time. She, however, felt under pressure to remain at work and stated that she would have expected a sensitive employer to suggest that she take time off if she needed it. It was also about this time that she became concerned about decreased fetal movement and dissatisfied with Dr. Chu's approach to her concerns. She felt that Dr. Chu's "wait and see" attitude was insensitive to her concerns.

The Complainant had called Ms. Smith on January 4, 1988 to advise her that she was in the hospital. The next day Ms. Smith cleaned out her office, phoned her to advise her that her personal effects had been placed in boxes and to request that her spouse pick up the items as soon as possible for security reasons. This, in the Complainant's view, was another example of Ms. Smith's insensitivity. The Complainant described herself as being in active labour but trying hard not to have a baby and found Ms. Smith's demand that her spouse retrieve her belongings very stressful. She conceded that she had advised Ms. Smith that she would not be returning to work before the birth of her baby and, as a result, would be gone for a considerable period of time. She also conceded that whoever replaced her would be using her office and desk.

Her interpretation of Ms. Smith's motives was attributable to a comment made by a secretary to the Complainant at their Christmas party to the effect" Cynthia Smith has said that you won't be

returning after you have your baby". That comment, coupled with Ms. Smith's previous remarks about the Complainant's lack of weight gain were hurtful. She never approached Ms. Smith about this comment because she felt it would have been confrontational and would have provoked hostility. She did not think it would be an appropriate way of dealing with the matter just before Christmas. She described Ms. Smith's actions as harassment and refused to concede that Ms. Smith's response to her telephone call might have been a reasonable approach to ensuring that, during the Complainant's absence, her belongings were not stolen. She was shown a card sent by Ms. Smith to her while she was in hospital which stated on the front:

> "You're good. Happy good persons day has just been declared in honour of you. Hope ya like this plant, a gardenia. It needs to be kept damp and on a window sill and should bloom quite soon. Very best, Cynthia Smith"

The Complainant found Ms. Smith's comment interesting because even though she had considered her a friend, she was not prepared to give Ms. Smith the benefit of the doubt and disregard the comments from another staff member about what Ms. Smith was reported to have said. She was also very upset that, although many people in the office came to visit her she was in the hospital, Ms. Smith and Mr. Gardner did not. She felt their absence was "peculiar" and "significant".

She also viewed the various memos sent by Ms. Smith and Ms. Schoenberger as harassment. In her view she was in the hospital and doing everything in her power to prevent a premature birth and she was entitled to sick leave. She was upset about the fact that the STSP provided for pay following a miscarriage but not for someone in her situation who was trying to prevent a miscarriage. When she received the leave form and realized that the Respondent intended to place her on maternity leave on January 4, 1988, it was clear to her that she would not be eligible for paid maternity leave and a six month extended leave. Even though she was aware that the policies allowed the Respondent to do that, it was very stressful for her to deal with that at that time. She found Ms. Smith's, Ms. Scotland's and Ms. Schoenberger's continued attempts to force her to sign the leave forms as harassment and adding stress to her general state of well being. However, during that same time she herself made contact with Ms. Rita Wilkinson at the

Ministry of Government Services, Inno Dubelaar, Terry Moore and Graham Mills about her situation and, in particular, Mr. Laberge's interpretation of the policy. She did not contact Ms. Schoenberger, because she felt that Ms. Schoenberger was pressuring her to sign the release forms and accept her interpretation of the policies. The fact that Ms. Schoenberger had written in red ink "please return A.S.A.P." was an indication of that pressure.

The Complainant was asked whether she had done anything to arrange alternate day care given that it appeared her leave might be considerably shorter than she had hoped. While she was in hospital she did not put her mind to day care arrangements. After the baby was born on March 10, 1988, notwithstanding the fact that she knew quite clearly that the Respondent's had denied her request for maternity leave thereby denying any possibility of an extended leave, and that it would have implications for her child care arrangements, her answer was "my mind set was on a particular trajectory."

She stated that it did not occur to her that the Respondent might be correct. She knew that she intended to appeal the Laberge interpretation of the policy. She believed that she would be entitled to sick leave and, therefore, maternity leave and the six month extended leave at the conclusion of her appeal. She made her plans on those assumptions and refused to consider the possibility that she might be wrong. Ultimately, on March 8, 1988, she met with fellow employees and sought their legal advice. They suggested that she sign the forms but note on them that she was doing so only because her job was in jeopardy and that she intended to appeal the decision.

She was asked of her concerns about the changes that were made to the leave form during this process. She viewed Ms. Schoenberger's amendments to the signed form as fraud. Her signature of March 9 was misconstrued so that it appeared as if she was in agreement with it, when she was not. She testified that she would not have signed any document that agreed to an extension of her probationary period. She felt that the form had been doctored after her signature. When it was pointed out to her that she had changed the form that had been signed by Ms. Schoenberger in the

first instance and that she was, in effect, guilty of the same misconduct, she acknowledged that they were both wrong for having made amendments to a signed document. She stated, however, that Ms. Schoenberger's amendments were more extreme, even though she acknowledged the amendments made by Ms. Schoenberger had been highlighted so that she would be aware of them and hers were not.

Notwithstanding the agreement that the issue of remedy and damages would be reserved, the Complainant was asked whether it was her desire to be reinstated at the Legislative Assembly. She answered that a return to that position would be a return to a poisoned work environment. She requested that she be placed in a comparable position within the Legislative Assembly, or more broadly, within the Ontario Public Service. When it was suggested to her that the Legislative Assembly had no power to dictate who is to be employed in the public service, she replied that there were thousands of employees in the Legislative Assembly and that she could probably do a job with equal value in any of those positions rather than being placed back in the Legislative Research Service. It was her evidence that nobody in their right mind would go back to a "hostile, poisoned environment."

She was asked about the role of the research service. She agreed that its employees were required to be non-partisan because they provide direct information to members from all of the political parties. Opposition members request research information from the department in order to challenge Government initiatives. The Government of the day uses the services of the Research Department to explain and/or justify their political decisions in the House. For that reason the employees who provide the research information must be seen as being non-partisan so that they can be satisfied that the information is provided in an objective, unbiased manner. It was suggested to the Complainant that, as a result of her appeal process she contacted various MPPs, thereby putting her partisanship in issue. For example, the March 21, 1988 letter to Ms. Schoenberger from Mr. Terry Moore was copied to Mr. David Cook, who was an NDP member of the Opposition at the time. The Complainant discussed that letter with Mr. Moore before it was sent and Mr. Moore advised her that he was sending it to Mr. Cook not as an MPP but as a

member of the Board of the Internal Economy who would be ultimately responsible for the decision. It was her opinion that, because the matter dealt with a personnel matter, it was not inappropriate to copy Mr. Cook notwithstanding the fact that the letter was sent to only one member of the Board of Internal Economy as opposed to the full Board. She stated that Mr. Moore had advised her that he had worked for Mr. Cook in the NDP research service before he began working for OPSEU and that he felt comfortable making him aware of the situation. When it was suggested that there would be a perception of partisanship in sending that letter, the Complainant referred to the fact that Ms. Schoenberger had expressed her displeasure of the fact that the Complainant was being represented by an OPSEU staff member. When it was further suggested to her that this was another example of the Complainant maintaining her view of the situation and being oblivious to the possibility that another view might be correct, she merely agreed to disagree. When Ms. Smith raised with the Complainant the fact that she might be putting her partisan status in issue by contacting Mr. Cook, the Complainant made a distinction between contacting Mr. Cook personally and her representative contacting Mr. Cook. When it was suggested to her that by accepting Mr. Moore as her representative she had, in effect, given him the ability to speak on her behalf, she suggested that the use of the word "agent" was strong phraseology. She viewed Ms. Smith's questioning on this issue as "persecutory."

It was pointed out to the Complainant again that, by March 29, 1988, it was clear to her that the Respondent was not going to allow her to use vacation days to bridge the gap between her anniversary date and date of delivery. She was asked whether she had done anything to reorganize her day care arrangements in light of this letter. The Complainant testified that it was her impression that once the appeal process had begun, the whole matter was open for discussion. She was still committed to the view that if she was successful in her appeal for sick leave, which would have taken her to the birth of her baby or even longer because she was still weak and sick after the birth, that she would have been entitled to maternity leave and therefore entitled to remain off work until October or January of 1989. She did not make any telephone calls regarding day care arrangements until July 4, 1998 when she was advised that she was to return to work on July 18, 1988.

The Complainant denied that the consequence of the denial of maternity leave was that she would not be entitled to SUB benefits and a further six months unpaid leave. It was her view that it was obvious from her letter of March 9, 1988, that she was giving notice to the Respondent that she intended to grieve the denial of sick leave. She considered the Respondent's decision to be an arbitrary imposition of maternity leave that was inconsistent with her subsequent strategy to grieve the sick leave, the maternity leave and her hope that she would then be entitled to all the benefits.

The Complainant was questioned about her May, 1988 letter to Dr. Elaine Todres. Specifically she was asked why in the enclosures to that letter she only included two copies of the Request for Leave of Absence forms and not the original signed by Ms. Schoenberger. The Complainant's response was that in her view it was not relevant. The relevant applications were those that were subsequently changed by Ms. Schoenberger after the Complainant had signed them. She was asked why she copied that letter to the Honourable Murray Elston, particularly after her discussion with Ms. Smith about contacting members of the Government. The Complainant maintained that, in her view, it was a personnel matter that properly went to Dr. Elston, who was her ultimate employer. Her information from Ms. Schoenberger had been that the final decision about her request would be made by the Management Board of Cabinet and so, it was appropriate that she send a copy of the letter to Dr. Elston, who was head of the Management Board of Cabinet at the time. When it was suggested to her that Ms. Smith did not agree that there was a distinction between personnel matters and non-personnel matters and that her approach to Mr. Cook and Mr. Elston had been inappropriate, the Complainant contended that it had never been suggested to her that she had acted improperly.

The Complainant stated that she contacted Mr. Cook because he was the official Opposition representative on the Board of Internal Economy and therefore would have some leverage in raising issues before the Board. He was not contacted because of his affiliation with the NDP. The Complainant also contacted Dr. Murray Elston, David Peterson, Andy Brandt, leader of the Progressive Conservative Party and Bob Rae, leader of the New Democratic Party. When she wrote to Dr. Elaine Todres about her problems, she copied Dr. Murray Elston, who was the

Minister at the time. Subsequently she wrote letters to all the members of the Board of Internal Economy, including Mr. Edighoffer, Liberal members Barbara Sullivan, Joan Smith, Richard Patton, Shawn Conway, Mr. Eves, the Conservative representative on the Board, and Mr. Cook. She also contacted Mr. Richard Johnston who was an NDP member at the time because she knew that he had helped another employee in the Legislature who had been experiencing problems with her work situation.

She acknowledged that she had applied for a job with the NDP research service but only because it was advertised. If either of the other two political parties had advertised for staff, she would have applied to them as well. It was not a partisan decision on her behalf. She later conceded that her application for employment with the NDP party was not a response to an ad in the paper but rather the result of a personal suggestion of Mr. Johnston that she apply to the NDP government of the day for a position.

It was pointed out to her in cross-examination that the letter of application to the NDP included a resume highlighting her past work experience, education and political activities within the NDP. She clarified that her involvement with the NDP occurred when she was living in Manitoba. She maintained that when she was asked about previous affiliations with a political party, the questions were specifically "in this province." When she was living in Manitoba, she was on the executive of the provincial NDP party. She did not feel compel to disclose that relationship during the interview because it was outside of the province. She agreed with Respondent's counsel that her position on the executive of the NDP was a significant level of involvement in that party, although she stated that, in that capacity, she did not meet with or correspond with any of the NDP executives in Ontario. She agreed that she was aware when she was hired that political involvement and the perception of political involvement was antithetical to a position in that department. Nevertheless she did not feel that it would have been prudent for her to advise her future employers about that involvement because it was past history. She answered truthfully that she had not been involved with any political party in Ontario and felt that she could temper her own political beliefs and research positions in a fair and reasonable manner. Neither did she see

her contact with Mr. Cook as being partisan in nature. She did not ask for his assistance because he was a member of the NDP but rather because as the Opposition member of the Board of Internal Economy he could raise matters at board meetings with legitimacy. She was asking him for help on a personal matter regarding her employee rights.

Mr. Thomas told her on June 20, 1988, that she could not use vacation credits to bridge a gap in service in order to reach her anniversary date. She was not prepared to accept his opinion of the matter. She pointed to the example of another employee who had been allowed to use three weeks of vacation to reach her year of service. She stated that, in Mr. Thomas' view she had been wrongly denied the maternity leave and that it ought to have been approved.

The Complainant relied heavily on her discussion with Ms. Smith in April of 1988 wherein Ms. Smith advised her that she was unclear as to "as required" meant on the leave of absence form. The Complainant agreed that Ms. Smith was not the final decision maker on the characterization to be given the leave. The Complainant maintained however that, as a result of her discussion with Ms. Smith, she believed that she was entitled to remain on maternity leave until at least October of 1988 and as late as January of 1989. It was pointed out to her that she filled out her application for unemployment insurance benefits for maternity leave on March 15, 1998, and on that form she stated that she would be returning to work on July 7, 1988 and that date was consistent with the notice by the Clerk that her leave concluded on July 7, 1988 and that she was expected to return to work on July 18, 1988. It was the Complainant's contention that if the Respondent had clearly stated on the leave of absence form that she was to return on July 7, 1988, she would have made arrangements for day care consistent with that. Because it was uncertain and because she believed that she was entitled to an additional six months leave of absence, she did not. While she acknowledged that she knew that her request for extended leave on compassionate grounds had been denied, she maintained that the duration of her leave remained in dispute. She suggested that Ms. Schoenberger could have been more clear, which would have eliminated some of the later problems that arose regarding her return to work. She denied the suggestion that she knew in March of 1988 that her leave was to expire on July 7, 1998. She

stated that she had made it clear on April 27, 1988 that she was prepared to come back as early as October but would prefer to return in January of 1989. She stated that she was willing to "even accommodate their needs if that was the case, if she wanted me to return in October." She saw her offer to spend less than 6 months at home with her child as a significant accommodation.

She received a letter on July 5, 1988 advising her that she was to return to work on July 18, 1988. On the following day, that is July 6, 1988 she prepared a response in which she stated that she would be unable to return to work because she had been unable to secure adequate day care. In her correspondence to the Human Rights Commission, she advised them that she had made inquiries at Queen's Park Day Care Centre on July 12, 1988. It was suggested to her that even before she made inquiries about alternative day care arrangements she had advised the Clerk that it was impossible. She pointed out that within 3 weeks of her notice to return to work she had managed to secure day care for October 1, 1988. Her calendar/diary for 1988 contained several notations with respect to inquiries about day care. There were, however, none for July 5, 6, 7 or 8, 1988. The Complainant stated that the calendar/diary was sketchy and that many things were not included, although it would appear from a perusal of the diary that the Complainant took care to note significant events during this entire process. During that time she interviewed five nannies but found none of them to be acceptable even though they would have been available within the time frames set by the Respondent for her return to work. When she was asked whether she canvassed any agencies with respect to day care providers, she stated that she felt that she had "looked adequately." In her view she had found something else that was sufficient. Her attempts to find day care were complicated by the fact that she had removed her son from the before and after school program for day care. She had suggested previously that it was financial considerations that demanded his removal from that program. In cross-examination she agreed that it had been her plan to remove him from the before and after school program whether she had received maternity leave benefits or not. She acknowledged that the decision to remove her child from the program was not due to the fact that she had been denied benefits since six months of those benefits would have been unpaid in any event.

In her diary, on July 11, 1988, there was a telephone number and an entry respecting rent for a one bedroom cottage. That cottage was paid for on July 27, 1988 and the Complainant spent the week beginning August 13, 1988 there with her family. When it was suggested to her that her letter to the Clerk, advising him that it would be impossible for her to obtain day care was based on the assumption rather than actual efforts, she stated that it would be "improbable" that anyone could arrange suitable day care within two weeks. She agreed that the chances of success would be increased if someone were allowed eight weeks and conceded that, in fact, she had almost eight weeks between July 4, 1988 and August 23, 1988 in order to do so. She was asked what would be a reasonable period of time for an employer to wait for an employee to arrange day care. She suggested that in her case the Respondent had already replaced her and that there was no pressing need for her to return. She agreed that she never intended to return on August 2, 1988 and that she had provided evidence to them about her reasons. She never told the Clerk that she had arranged to be away for the week beginning August 13, 1988, nor did she make arrangements to leave a telephone number where she could be reached. She continued to be hopeful that her leave would be approved until at least October 1, 1988.

The Complainant was asked about her spouse's availability for day care. He was a professor at York University and it was suggested that he would have been available to provide day care during the summer. She stated that he did not consider providing child care as part of his role. When it was suggested to her that this was another way of saying that he would not help, she repeated that it was not what he saw as his responsibility. She was asked whether she had made inquiries into day care at York University and answered that they had not considered it because it was at least 35 miles away from their home. It was too inconvenient. When it was suggested that it would have only been inconvenient for her spouse, she asserted that it would have been inconvenient for everyone. She also stated that it had extremely long waiting lists because it was regarded as one of the best centres in Ontario.

While the Complainant conceded that she did not report for work on August 9, 1988 as ordered, she maintained that she did attend at work to deliver a letter explaining her inability to attend.

It was her view that she did not abandon her position and that she had every intention of returning to work. When she was reminded that she had been warned explicitly that a failure to report for work on that date would be viewed as an abandonment of her position, she insisted that she was acting on Mr. Cook's information that Mr. Edighoffer and Mr. DesRosiers were "open" to some type of accommodation. When she was asked why she would assume that the Clerk would be prepared to accommodate her to the full extent of her wishes, she stressed that returning to work in October was not the full extent of her wishes and that her initial request had been to remain off duty until January of 1989.

It was pointed out to her that she had submitted applications for employment after August 23, 1988 and before December of 1988. She was asked whether she would have been prepared to commence employment during that time and if so what she would have done regarding day care. She said that she had day care arranged by October 1, 1988 and that she could have begun work any time after that. She suggested that in discussing new employment opportunities, the start date would have been negotiable.

At the time of the hearing Mr. Jim Thomas was the Deputy Minister of Management Board Secretariat. His history with the Government of Ontario began in 1988 when he joined the Ontario Public Service in the Human Resources Secretariat as an Assistant Deputy Minister, Employee Relations and Compensation. In 1990 or 1991 he became Deputy Minister of the broader public sector in the Labour Relations Secretariat. In 1992 he was the Deputy Minister of Labour and in July of 1995 assumed his current position. In 1988 he was the Assistant Deputy Minister of Employee Relations in compensation in the Human Resource Secretariat. He was responsible for collective bargaining with the OPS and provided advice to the Ministries on grievances and labour relations matters. He was also responsible for policies affecting compensation and benefits for the OPS. His immediate supervisor was the Deputy Minister of the Human Resources Secretariat, Dr. Elaine Todres. He became familiar with the Complainant because of a letter she wrote to Dr. Todres on May 3, 1988. Dr. Todres asked him to make inquiries about the letter since there were issues involving benefits and compensation. It was his

recollection that there were two issues: one involving the entitlement to sickness compensation or benefits between January and March of 1988 and the maternity leave benefits following the date of delivery. Mr. Thomas was aware of an opinion from Mr. Laberge concerning the sick leave benefits but requested another legal opinion which ultimately reversed the previous decision and resulted in the granting of sick leave benefits to the Complainant.

Mr. Thomas testified that, because her date of delivery was four or six days before the completion of the one year qualifying period, she was not entitled to maternity benefits. He advised her that there was discretion afforded to the Speaker of the Legislative Assembly to grant her request for maternity leave, notwithstanding that failure to meeting her anniversary date. He advised Ms. Schoenberger of the results of the meeting and suggested to Dr. Todres that they close the Complainant's file. Mr. Thomas testified that it was unusual for an employee to appeal directly to him. It was not unusual for him to provide advice to human resource representatives from various Ministries, but normally those kinds of inquiries would be dealt with within a Ministry. Despite the fact that the request was unusual, Dr. Todres was of the view that there were some aspects of the case that were sympathetic enough to warrant an inquiry. Indeed, the denial of sick leave benefits was reversed as a result of those inquiries. The circumstances of the case were also unusual. The fact that the Complainant had missed her qualifying year of service by such a short period of time raised Dr. Todres and Mr. Thomas' interest in the case. Mr. Thomas was asked generally what considerations would taken into account by a Deputy Minister in deciding to grant discretionary leave. He explained that there were no guidelines that he was aware of, and that exercise of discretion involves a decision on the particular facts of the case before him/her, whether to grant the leave. Each Deputy Minister could come to a different decision or exercise their discretion differently on the same facts. They might consider whether sympathetic considerations should prevail, whether the Government could afford to grant the leave, how critical it was to the operations of a Ministry at that point in time and the personal considerations of the individual seeking the leave. He was not suggesting that was an exhaustive list, but offered that these would be some of the things that a Deputy Minister would consider in deciding to exercise his/her discretion.

Mr. Thomas acknowledged in cross-examination that at the time he was considering the Complainant's request for assistance, he assumed that she was a public servant and that the *Public Service Act* policies and interpretations applied to her. He also conceded that it would not be unreasonable for a Deputy Minister to consider whether granting an individual's request for discretionary leave might create a precedent.

Ms. Gwen Morgan, at the time of the hearing, was a social worker at Women's College Hospital in the Diabetic Education Unit. In January of 1988 she was doing a placement for her masters in social work and was assigned to work in the high risk obstetrical unit. She was assigned to work with Mary Addison, a social worker, who worked there as part of a psycho/social team consisting of a clinical nurse, a psychiatrist, doctors, nurses and clergy from the community. A full time social worker was assigned to the unit because of the stressful nature of the confinement of these high risk pregnancies. There was every chance they might lose their baby. As well, the patients were removed from all of the social support networks in their homes. Group sessions were organized to encourage the patients to get out of their rooms and meet other patients in similar circumstances to create an internal network of support. Ms. Morgan first met the Complainant when she came to that group.

Ms. Addison asked Ms. Morgan to speak to the Complainant because, in introducing herself and relating her story to Ms. Addison, the Complainant had begun to cry. Ms. Addison suggested that Ms. Morgan talk to the Complainant to see if she could offer her some assistance. When Ms. Morgan met the Complainant she was on complete bed rest and was upset and crying. She seemed to be very anxious. During the first meeting they talked about her previous pregnancy and the effect that it was having on her current pregnancy. They discussed the fact that it had taken the Complainant a long time to become pregnant and how valued this child would be. She made a note in the Complainant's file at the time to the effect that she was upset about her supervisor's response to her hospitalization. She could not recall the actual discussion at the time: just a general recollection of what the Complainant raised it in their initial talk. She recalled that it was very important to the Complainant that she receive sick leave and was upset that her

employer was characterizing it as maternity leave. The Complainant was discharged earlier than was expected and Ms. Morgan did not see her again until she was re-admitted for her delivery. Ms. Morgan recalled that the Complainant's emotional state did not change during her stay in hospital and that she seemed to be upset all of the time.

Mr. Murray Elston is presently the President of Bruce Energy Centre Limited, an industrial park adjacent to the Bruce Nuclear Power Development in Bruce County. He has been in provincial politics for many years, beginning with his election in the riding of Huron Bruce. He was a member of Cabinet from June of 1985 to October of 1990 and, during that time, was Minister of Health, Chair of Management Board and Minister responsible for financial institutions. As the Chair of the Management Board, his duties were divided into two areas, finance and human resources, which involved the development and management of human resource policies for the entire public service of the Government of Ontario. It included negotiating contracts, implementing new policies and programs and administering the current policies of the Government. He was also responsible for management issues concerning people employed as Ministry staff and staff from the Premier's office. He described the Legislative Assembly as a separate entity with its own budget. The Government accepts advice from the Speaker and the Board of Internal Economy as to what that budget should be. He described the Board of Internal Economy as the budget review for the Legislative Assembly: the body that sets policy for each of the caucuses and employees at the Legislative Assembly. It operates in the manner of a Board of Directors. The Speaker is the Chair of the Board. Matters brought before the Board of Internal Economy are discussed by the members and issues are decided by way of a vote. In his experience personnel matters generally did not go before the Board of Internal Economy. The management of the Legislative Assembly was left to the staff of the Legislative Assembly. If there was to be a change in policy, the Board of Internal Economy would have been advised and probably asked to confirm or verify that change. He did not recall having ever dealt with any personnel issues while he was a member of the Board of Internal Economy. He testified that there was no connection between the OPS and the Legislative Assembly, although it was common to have policies from the Public Service adopted by the Legislative Assembly.

He became aware of the Complainant's situation when he was sent copies of correspondence between the Complainant, Dr. Todres and Mr. Thomas. Alan Young, his executive assistant at the time noted on one of the letters that the Complainant was ineligible for maternity leave because she was four days short of her anniversary date and suggested that he was sympathetic to her problems. He advised Mr. Elston that the Speaker had the discretion to waive the requirement but chose not to and wondered whether Mr. Elston would be prepared to discuss the matter with the speaker. Mr. Elston wrote on that same note "there must be something more to this." He knew the staff in the Legislative Assembly and believed that they administered their benefits in an even-handed and fair manner. It was his opinion that there must have been circumstances he was unaware of for the Legislative Assembly and the Speaker to have denied the Complainant's request. As the administrator of benefit plans and policies that represented possibly 90,000 people in the public service, he understood the concerns about exceptions to the rules that might cause difficulty in the future. It was his decision that it would be inappropriate for Management Board of Cabinet to intervene once the Speaker had exercised his discretion. He advised the Complainant that there was nothing he could do for her in the circumstances.

He was asked what factors he would take into account in deciding whether to exercise his discretion in a case such as Ms. Wight's. He said that he would have to be absolutely certain of the effect of the exercise of discretion on the administration of the benefit package for all of the public service. As guardian of the benefit package covering over 90,000 people, he had to ensure that the exercise of his discretion in a particular case would not disadvantage others. He expressed some concern that when changes are made to policies or, as he described it, "yardsticks are moved", it has impact on the negotiations for the public sector. It creates, in effect, a new floor upon which negotiations will proceed and part of the exercise of the discretion involves a consideration of the impact that will have on the OPS and the consequences for the government.

Mr. Edwin Harrigan is a Benefits Consultant with the benefits section of Management Board. He provides benefit and policy interpretations and clarifications to the Minister. His responsibilities involve the administration of benefits to various ministries, but not directly to employees. He

explained that the STSP is a salary replacement continuation program administered by the Government. Its benefits are not controlled by an insurance carrier. The monies paid to employees on STSP is regarded as salary. In contrast, the long term income protection program is administered by an insurance company. The maternity and paternal leaves are not administered by an insurance company but by the provisions of the *Public Service Act* or any collective bargaining legislation.

Mr. Terry Moore is an OPSEU representative and he assisted the Complainant in drafting the grievances and attended at meetings with her to discuss them. When he first contacted Ms. Schoenberger, she advised him that the employees of the Legislative Assembly are appointed by the Speaker under the *Legislative Assembly Act*, the sole statutory authority applicable to its employees. She further advised him that it was inappropriate for the Legislative Assembly employees to be represented by OPSEU or any other Union and that the grievance procedure applicable to the Complainant was set out in the Legislative Assembly's Manual of Administration. Mr. Moore assured Ms. Schoenberger that he was not acting as an OPSEU representative but simply as Ms. Wight's chosen spokesperson, which was her right under that grievance procedure. Mr. Moore made at least two requests to Ms. Schoenberger for the grievance procedure but she declined to provide it to him, restating her objection to him representing the Complainant and advising him that she would provide a copy of it to Ms. Wight. The grievances concerning the denial of sick leave and maternity leave and the extension of the probationary period were denied at the first stage of the grievance procedure and advanced to Ms. Schoenberger as the second stage, where they were also denied. The next step was to the Clerk, Mr. DesRosiers, who denied the first two but reduced the extension of the probationary period by six months. The last stage in the grievance procedure was an appeal to the Speaker, which was also denied.

He was asked why he sent a copy of the letter to Mr. Cook. He explained that, at the time, Mr. Cook was the Opposition member on the Board of Internal Economy. Having worked at the Legislative Assembly, Mr. Moore was familiar with the function of the Board of Internal Economy and described it as a powerful committee that was instrumental in establishing terms and

conditions of the employment for the employees of the Legislative Assembly. He described it as a forum in which issues could be raised. In fact, Mr. Cook advised Mr. Moore that he had raised Ms. Wight's situation with the Board of Internal Economy.

It was Mr. Moore's opinion that the Respondent intentionally refused to recognize the unique circumstances of the Complainant's situation. He attempted during the grievance procedure to relate his experiences with respect to sick leave benefits during pregnancy in the public sector, to no avail. During their discussions in the grievance process, Mr. Moore attempted to raise performance issues, particularly in light of the criticisms the Complainant had received about her work. He found it ironic that the Respondent's position was that performance was irrelevant to the grievances and that there were no problems with the Complainant's performance. He and Ms. Wight tried to impress upon them that, in fact, the performance issues were related directly to the pregnancy, again to no avail.

Upon cross-examination Mr. Moore conceded that the use of the OPSEU letterhead might have reasonably led Ms. Schoenberger to the conclusion that he was representing the Complainant in his capacity as a Union representative. He maintained, however, that Ms. Schoenberger was aware of the internal grievance procedure and should have known that Ms. Wight had the right to select whomever she chose as a representative. He agreed that it was unfortunate the proceedings began on such a misunderstanding, but described his exchanges with Ms. Schoenberger as "not friendly." Mr. Moore was unaware of the concerns within the Legislative Assembly about the appearance of or actual partisanship of its staff. He explained that he wrote to Mr. Cook not because of his affiliation as an NDP Opposition member but as a powerful voice within the Board of Internal Economy. He described the Board of Internal Economy as playing an important role in the decision making with respect to the Legislative Assembly. Mr. Cook's role as the official Opposition was like a countervailing voice. Even though the Board of Internal Economy is made up primarily of members of the Government, the voice of the Opposition can be an effective tool in influencing their decision making.

Dr. Januszewska is a psychiatrist whose special interest is family dynamics, family therapy and long term psychotherapy of abuse victims. She was doing in-patient hospital psychiatry and was seconded to the obstetrical and gynaecologist service at the Women's College Hospital on the high risk pregnancy unit in 1986. She described the unit as having 20 beds, 16 of which were 4-bed rooms, and 4 single rooms. Women who are severely ill or women whose babies did not survive are assigned to the single rooms. Women who are otherwise healthy but in danger of giving birth to a premature infant or an infant with special needs, are placed in the 4 bed units. The patients come from diverse cultural backgrounds and were forced to spent weeks, if not months, together in these rooms. They were separated from their families and had little in the way of social support, except for each other. Because they lived in such close proximity and for such extended times, things begin to annoy them and more and more as time goes went and they felt helpless about their inability to change any of that. Those feelings were complicated by the fact that, generally speaking, the women were healthy. They may have been trying to prevent a premature birth but in all other respects felt well and therefore found the confinement to the room and oftentimes to bed very difficult. It was not unusual for them to get what Dr. Januszewska described as "cabin fever." Some of her responsibilities in the unit included attending weekly psycho-social rounds where every patient on the unit was discussed by a multi-disciplinary team. It was common for recommendations to be made by the group that certain members of the group speak with patients. Dr. Januszewska was asked to speak with Ms. Wight because of what the nursing staff described as "anxiety." In the clinical notes she wrote a diagnosis of situational anxiety and obsessional personality. Situational anxiety means anxiety which is triggered by something in the external environment of the patient or in the patient's life and is a normal reaction to stress. People manifest their stress in different ways, depending on their previous experiences, their personality styles and their coping skills. Her reference to obsessional personality was to a personality style and not a personality disorder. She described obsessional people as well organized, punctual, punctilious sometimes, needing to be in control, having everything in its place and living religiously by the rules. The essence of an obsessional personality style is that it is adaptive. People who have it are hard workers: people who get their work done on time: loyal people who do things by the rules. If things go well, society rewards

them. She described about 90% of doctors as obsessional. The difference between an obsessional personality and an obsessional disorder is that people with the disorder do things in order to reduce their anxieties but in a rational uncontrollable manner. An example would be the compulsive hand washer or someone who keeps going back to make sure their front door is locked. Their conduct becomes a problem for them. When it is a personality style, these actions work for them rather than against them.

She determined that the Complainant had an obsessive personality style after visiting with her for 30 - 40 minutes. Her history indicated a high achiever. She graduated as a registered nurse but continued to take courses to improve her career choices. The area around her bed was neat, without a tissue out of place, which Dr. Januszewska described was somewhat unusual on the unit. She said that the Complainant did not talk about her feelings and refused to acknowledge any negative feelings. Dr. Januszewska did not see the Complainant again because she was discharged. She was asked about her comment in her clinical notes about her intention to see the Complainant again but to "go very gently." She explained that she was aware that the Complainant had become very upset in a previous group about some of the comments made by the other patients. When Dr. Januszewska attempted to empathize with her over her feelings, the Complainant denied that there were any difficulties. Dr. Januszewska testified that it was very important for the Complainant to look on the bright side of things and refused to allow herself to think that the outcome of her pregnancy might be anything but favourable. In Dr. Januszewska's opinion she was tightly controlling her feelings so as not to allow herself any negative feelings. Dr. Januszewska formed the opinion that the Complainant was embarrassed at having a broken down earlier in the group and had decided she would not do it again. Dr. Januszewska respected her wishes and did not press.

Dr. Januszewska recalled that there had been comments documented in the Complainant's medical files about the stress she was feeling from her work situation. She did not discuss those concerns with her. Dr. Januszewska agreed that because there was no mention in her clinical notes about work concerns, they were not raised by the Complainant during their meeting.

Ms. Jane Beach is currently the director of the Child Care Branch in the Ministry of Womens' Equality for the Province of British Columbia. As such she is responsible for the overall co-ordination and delivery of child care services in that province. Prior to that she was a co-ordinator of the Child Care Resources and Research Unit at the University of Toronto, which houses the largest compilation of research on child care policy and legislation in the country. She has also worked as a senior policy analyst in the Ministry of Community and Social Services in the Child Care Branch where she was responsible for establishing innovative and flexible models of child care to meet unusual needs. She worked at the City of Toronto as a workplace child care co-ordinator and as a researcher and consultant on a number of child care projects ans had conducted a number of national studies. She has also published a number of works on child care, including the study on the workplace child care across the country for a task force on Child Care in 1984. She also did a follow up to that study in 1991 and 1992. From 1992-1997 she held the position of Work Related Day Care Co-ordinator in the City of Toronto. That position involved working with employers and unions to assess the need for child care at the workplace and to provide assistance to any group interested in providing it. It included conducting needs assessments, assessing suitable locations, working with employers to identify options of providing day care and ultimately implementing the establishment of day care. During that time she was also a member of several boards, including the National Action Committee on the Status of Women, Child Care Committee, various research committees, involved in various research studies, Board of Governors of George Brown College and the Chair of their Early Childhood Advisory Committee. It was agreed that the witness could be qualified as an expert on matters of policy with respect to child care at the relevant time.

Ms. Beach also gave evidence regarding her own personal experience with maternity leave and in the public service, not, obviously in her capacity as an expert witness.

In the spring of 1992 Ms. Beech was contacted by Ms. Wight and a Human Rights Commission investigator in her capacity as co-ordinator of the Child Care Resource and Research Unit. She and her colleague, Martha Friendly, met with the Complainant and discovered that there were

similarities between Ms. Beach's personal situation and that of the Complainant in 1987. Ms. Beach was hired in October 19, 1987 but was unable to actually take over her position until October 26, 1987 because she was serving on a jury. Her anniversary date, however, was October 19, 1987. In January of 1988 she became pregnant with a due date of October 19, 1988. In March she went for a prenatal diagnostic screening procedure during which an artery in her uterus was ruptured and she was hospitalized for approximately 2 1/2 weeks. She was then told that she needed total bed rest for at least another eight weeks. She inquired about sick leave benefits. She understood from the public service booklet that she would be eligible for short term sick leave unless she suffered from a pregnancy related illness. She and her manager discussed whether an accident caused by a physician during pregnancy was a pregnancy related illness.. Her manager agreed that she was entitled to sick leave benefits and she chose to take it at 75% of her pay in order to accumulate vacation time, because her pregnancy had by now been diagnosed as high risk. She returned to work in June of 1988 and submitted a request for vacation on October 7, 1988 and a commencement of her maternity leave on October 19, 1988. However, she delivered on September 29, 1988 by emergency caesarian section. She contacted her manager and requested that she be permitted to use vacation days up to October 19, 1988 when she would officially begin her maternity leave. Her request was granted and she was told that she would be eligible for seventeen weeks at 93% of her salary and then up to six months of unpaid leave after that when she could return to work on a part-time or other flexible arrangement. She chose to take the initial two months of unpaid leave after the 17 weeks of paid leave and returned to work in mid-April on a part-time basis until the beginning of September, when she returned to work full time.

Because she, too, had been having fertility problems, she actually had placed her name on a waiting list in several child care centres for a year before she actually became pregnant. She stayed in constant contact with these child care centres during the period, particularly after she discovered she was pregnant. She was all too well aware of the difficulty in securing infant day care and knew that a waiting list would be lengthy. Despite her advance notice, she was not advised of an opening until a week before she was to return to work. By using her vacation days

she was allowed to apply for maternity leave on the anniversary date of her employment, even though she had delivered two weeks earlier. Her leave was approved by the manager of the program development unit in the Child Care Branch of the Ministry of Community and Social Services.

Ms. Beach referred to the annual release of statistics from Health and Welfare Canada that track the availability of child care by comparing supply and demand. The number of day care spaces in each province is listed, as are the types of licensed care, that is, regulated family day care or licensed day care centre. The data also notes whether the facility is funded by the Government or whether it is a commercial or corporate enterprise. Those charts indicate that between 1976 and 1991, the years when the comparisons were done, the number of day care spaces grew but not enough to compensate for the increase of participation in the work force by women. The chart also showed that there were only 10,000 group day care spaces for children from 0 to 17 months. That indicates that approximately 5% of women with children of that age could place their child in licensed day care. The percentage in Ontario for that period of time was 5.18%. As the child gets other availability increased until the child reached school age when again it decreased. Those charts indicate, according to Ms. Beach, that there is and was very little regulated child care for children of that young age. She referred to a study called the National Child Care Study done by the University of Guelph in 1988 which indicated that of the families that were using unregulated day care, more than one-half of them wanted regulated child care arrangements but were forced to accept inadequate child care exposed their child or children to potential risk. Regulated child care, in a day care centre or in a family day care, must meet certain legislative requirements regarding staff training, child/staff ratios and health and safety measures. It is monitored and licensed by the Government and subject to subsidies for low income parents. There are exceedingly long lists for subsidized day care. Unregulated arrangements fall totally outside the jurisdiction of the Government and it is a private arrangement between a parent and a caregiver. There are no training requirements, no monitoring and no professional care supervision as would be found in a regulated arrangement. Studies have indicated that the quality of care in a variety of areas, including environmental factors, health and safety and appropriate stimulation is higher in a regulated arrangement. Within that regulated

group the quality is higher in a non-profit setting than in a commercial setting. Ms. Beach testified that it was very difficult to collect comprehensive data on unregulated day care because much of it is done "under the table." Many care givers do not wish to claim the income and parents do not get the resulting tax benefit. As a result many parents feel that they are unable to complain about the quality of care because of the lack of alternatives. Ms. Beach stated that there have been many instances of parents arriving unexpectedly at an unregulated arrangement and finding activities going on that were detrimental to their child, although she conceded that similar instance could occur in a regulated setting.

In regulated group day care, staff are required to have a minimum of a two year Early Childhood Education diploma from a community college and many have greater qualifications. Increasingly, there are four year degree programs in Early Childhood Education and, in order to be a supervisor in a group day care centre, an employee has to have had significant experience as well as education. In regulated child care centres there must be a planned program that meets certain nutritional requirements, health and safety requirements, social, cognitive and physical developmental activity requirements appropriate for their age. There are no similar requirements in unregulated child care arrangements.

Ms. Beach's responsibilities at the time included a requirement to be familiar with all of the child care that was available in the City of Toronto especially in the downtown core. As a result, she was familiar with the operation of the Queen's Park Day Care Centre. It had lengthy waiting lists for all age groups and on occasion even refused to add names to their waiting lists. Ms. Beach testified that many parents find it comforting to have their child in a day care centre close to their work. In general, on-site child care centres tended to be in good physical spaces, were generally subsidized to some degree by the employer and had better paid staff. Advantages cited by the parents was their proximity to their child, their ability to visit them during the day, their closeness if an emergency arose and being able to observe type of care their child was receiving. In 1988 infant care in the suburbs was even less available than the downtown core. Part of the reason for that was the fact that the City of Toronto had set up a task force on workplace child care and

developed policies to encourage employers to provide it. It was the time of the developmental boom in Toronto and most large developers were being asked to include day care centres in the planning of their facilities. Even with that initiative, child care spaces, especially for infant children, continued to be sparse. It was Ms. Beach's opinion that research has proven that the lack of available child care has been a huge barrier to women achieving quality in the work place. A number of commissions and task forces have come to the same conclusion, including the Royal Commission on Equality in Employment, the Abella Commission, a 1984 Task Force on Child Care by the Federal Government released in 1986 and a subsequent study by a special committee on child care. More recently there was the U.N. Convention on the Rights of the Child in 1991, all of which have indicated that the lack of available child care is one of the single greatest barriers for women to be employed or access training opportunities. This lack of available child care has had a significant impact on women's abilities to participate in the work force to their full capacity.

In response to questions about unregulated day care, Ms. Beach stated that in her opinion she would have to be desperate before she would place her child in an unregulated day care setting. She described it as the "absolute last ditch option that I wouldn't seek out unless there were real extenuating circumstances." She offered that as her personal opinion, formed or based on her professional involvement for a number of years in the area of child care. She agreed that it was possible to find unregulated day care that would provide safe and adequate care for a child but maintained that the likelihood was very slim.

Ms. Linda Mahaney is a Senior Benefits Advisor in Management Board Secretariat. She became Senior Advisor in eighteen months before the hearing but has worked as a benefits advisor with the Management Board Secretariat since 1981. She testified that the short term sickness plan (STSP) is funded through payroll and not through any insurance company. In order to be eligible for short term disability benefits, an employee must be employed for 20 consecutive working days and benefits continue for 130 days, six of which are at 100% of salary, the remaining 124 days at 75% of salary. Prior to 1988, a section of the benefits booklet entitled "Effect of the Short

Term Sickness Plan" stated that if an employee had been directed to stay at home as a preventative measure prior to the date of delivery, no short term sickness benefits were granted. That, however, changed in 1988 or 1989, Ms. Mahaney was unsure of the actual date. While an employee is receiving STSP benefits, the Respondent continues to pay all of the premiums for its portion of the benefits and the employee's pay cheque is deducted to cover his/her portion. In contrast an employee on an unpaid leave of absence would be required to pay the employer and employee portion of his/her benefits, including contributions to the pension plan. Those benefits would include basic life insurance, supplementary health and hospital coverage, vision and hearing care, dental care and pension contributions. The cost of those benefits to an employee on an unpaid leave of absence who earns approximately $45,000.00 a year would be $750.00 a month including pension contributions. An employee on maternity leave is treated in the same manner as an employee on short term sickness or leave with pay with the exception that vacation and MCO credits are do not accrue. They would continue, however, to accrue service during their absence.

Deputy Ministers have the discretion to allow an employee to take a leave with or without pay in exceptional circumstances. Leaves with pay for more than six months requires certification by the civil service commission and the approval of the Lieutenant Governor in Council. A Deputy Minister, however, does have the authority to grant a leave of absence with or without pay up to six months without such approval. She explained the leave provisions in the Manual of Administration for the Ontario Public Service. She conceded, however, that the Legislative Assembly policies were not necessarily administered in the same fashion. However, with respect to discretionary leave, no one Minister is bound by the decision of another. Each situation is considered on its own merits.

Mr. Dave Cook was called as a witness for the Complainant. At the time of the hearing he was a member of the Provincial parliament for the riding of Windsor-Riverside and House Leader for the New Democratic Party. He had held positions as Minister of Housing, Municipal Affairs, Chair of Management Board, Government House Leader and Minister of Education and Training. The

Complainant's problems came to his attention when he was House Leader in the Opposition and a member of the Board of Internal Economy. He described the Board of Internal Economy as the policy making body for the Assembly consisting of MPPs. Decisions on expenditures and policies in the Legislature are decided by this Board. He was approached by Mr. Moore about the Complainant. Mr. Moore had been an employee of the NDP caucus as a researcher and knew Mr. Cook personally. According to Mr. Cook, the Board of Internal Economy was in charge of the operation of the Legislature and directed its staff in line with its policies and/or directives. It could, if it chose, change policy or exert some flexibility and exercise discretion with respect to the policies. Mr. Cook testified that it was not unusual for employees who had been unsuccessful in resolving problems through the usual course to approach a member of the Board of Internal Economy for assistance. As far as Mr. Cook was concerned there would have been no other reason for the Complainant or Mr. Moore to contact him except in his capacity as a member on the Board. Mr. Cook testified that the Legislative Assembly did not deal with a large complement of staff and that, generally speaking, most of the employees knew the members and vice versa. To the extent possible they attempted to deal with problems in a compassionate way. Most of his conversations were with the Clerk, although he did eventually write to Mr. Edighoffer as the Speaker and the ultimate decision maker. Mr Cook was aware of the concerns of the Speaker and the Clerk that granting the Complainant's request would create a precedent, however, it was Mr. Cook's view that given the small number of staff involved, it was unlikely that this situation would recur with any frequency. In his eighteen years of experience, he had personally never been made aware of any similar situation in the past. Mr. Cook attempted on several occasions to have the matter placed on the agenda of the Board of Internal Economy. Normally the agenda is prepared by the Administration at the Legislative Assembly, however, members can either telephone the Clerk's office and asked that an item be placed on the agenda or do it directly at the meeting. Eventually it was discussed at the meeting but Mr. Cook could not recall whether it was done before or after they had received notice that a complaint had been filed under the *Human Rights Code*. Mr. Cook could not recall with any precision exactly what was said at the meeting, although he did recall that it was discussed in a preliminary fashion.

In cross-examination Mr. Cook acknowledged that, given the nature of the role of the research department, that an appearance of partisanship would be unacceptable. However, he did suggest that the Legislative Assembly was not a sterile place and that, even though certain roles within the Assembly require an appearance of neutrality, socializing with members did not compromise that neutrality. Even if he had been approached in his capacity as a party member rather than a member of the Board of Internal Economy, he would not have been concerned about the appearance of partisanship.

The Complainant relied on a report by Dr. Murray Enkin, a specialist in obstetric and perinatal care. More will be said of this report later in this decision.

EVIDENCE FOR THE RESPONDENT

Mr. Claude DesRosiers is presently the Clerk of the Legislative Assembly and has been since October 1, 1986. Before that he had employed at the House of Commons in Ottawa for seventeen years. As Clerk of the Legislative Assembly he approved the Complainant's request for leave of absence up to her date of delivery. He later became involved in the Complainant's grievances at the second stage of the grievance procedure. He described himself as the chief procedural and administrative officer of the Legislative Assembly. As such he is the principle advisor to the Speaker and to all the members with respect to parliamentary procedure. He is also the Chair of the Management Advisory Committee and, therefore, main advisor to the Board of Internal Economy. He likened himself to the supervisor of the directors on the organizational chart of the Administrative Assembly. He described Ms. Schoenberger as the main advisor regarding human resource matters to the Legislative Assembly.

He stated that approximately 90% of the policies of the Legislative Assembly are the same as the policies in the OPS and, to that extent, are bound by the same policies. There were some distinctions, however, in the policies adapted by the Legislative Assembly. He acknowledged that he had some familiarity with the policies and procedures of the Legislative Assembly but relied on Ms. Schoenberger's advice because she was, in essence, the daily administrator of those policies.

He agreed with Ms. Smith and Mr. Land's recommendation that the Complainant's probationary period be extended. He described the probationary period as an important part of the hiring process and if an employee is away from work for a period of time, the length of time to evaluate that employee was insufficient. Approval of an extension to the probationary period is appropriate in those circumstances. He could not recall the reasons given for the extension but relied solely on the recommendations of Ms. Smith and Mr. Land. Neither could he remember the basis for his decision to reduce the extension to sick months. He believed it was on the representations made to him at the grievance hearing. Similarly he could not remember the reasons for granting sick leave. He did not know at the time that Ms. Schoenberger had sought an opinion from Management Board about the sick leave policy and stated that a legal opinion would not have necessarily influenced his decision in any event. His decision to grant the sick leave was based on a sense of equity. Those equity considerations, however, did not extend to the maternity leave. His decision to grant sick leave to March 10, 1988 was based on the fact that her pregnancy related illness had ended with the delivery. No one suggested to him that she might continue to be eligible for sick pay.

When he received the Complainant's grievances respecting the denial of sick leave and maternity leave and the extension of the probationary period, he arranged for a meeting on June 14, 1988. In attendance at that meeting were Mr. DesRosiers, Ms. Schoenberger, Mr. Moore and the Complainant. Subsequent to that meeting, on June 22, 1988, Mr. DesRosiers wrote to the Complainant advising her that she was entitled to sick leave benefits under the short term sickness plan from January 4, 1988 to March 10, 1988. He also decided to reduce the extension of her probationary period to six months but continued to deny her maternity leave. It was his opinion that he could not create a precedent with respect to the maternity leave. He described the rule as very clear, requiring a full year of service and holding no provision for an exception. Mr. DesRosiers testified that he was unable to allow her maternity leave because he was not prepared to recommend a precedent or set new guidelines because of the uncertainty it would create for the future. It was his opinion that the safest route would be to apply the policy in its strictest terms. He rejected the Complainant's submissions that she be allowed to take vacation or holiday time to bridge the gap between her date of delivery and anniversary date.

It was Mr. DesRosiers who communicated with the Complainant about her return to work. Although it was not usually his role to do so, it was his recollection that no one had heard from Ms. Wight respecting her return, which precipitated his first letter. He wrote to her on July 4, 1988 advising her that her seventeen week maternity leave had expired and that she was expected to return to work on July 18, 1988. He had been advised by Mr. Land that there was work to be done and that they needed the Complainant at work. When the Complainant wrote back to him asking for an extension of her leave, he considered her comments with regard to the difficulties in obtaining suitable day care. In his view, it was her responsibility to find day care so that she could fulfil the duties of her position. He subsequently advised her that he was denying her request for a further six months leave without pay but was extending her maternity leave until August 2, 1988. In his letter he advised her that they could not hold her position beyond that date. He remained of the opinion that it was her responsibility to find day care so that she could return to work as required. He offered her an additional two weeks to do that.

Mr. DesRosiers had a discussion with Mr. Edighoffer about the Complainant's grievance. Mr. DesRosiers explained his difficulty in creating a precedent or an exception to the rule. They discussed the difficulty in defining what numbers of days would or should be allowed in similar circumstances in the future. Mr. DesRosiers also expressed concern about the fact that the Complainant had contacted Mr. Cook about her grievances. He described the position of Research Assistant as one of the most sensitive in the Office of the Assembly. The employees are to treat all requests from members in confidence and are to have no personal or business contact with them that would place their political affiliation or preference in question. It in his eight years as Clerk there had only been one other situation involving an employee and a member of the House. In that case the employee worked in the cafeteria and there were no similar concerns regarding an appearance of bias. The research officers of the Legislative Assembly are to function in a completely apolitical manner with respect to the members and their requests.

Ultimately Mr. DesRosiers did grant the Complainant a further extension to her leave to August 9, 1988. This was the last one he was prepared to offer. The Director of the library had made it very

clear to him that there was work to be done and that they needed Ms. Wight to do that work. He made a call on August 17, 1998 to a phone booth in a store on the shores of Lake Erie. In that telephone conversation, despite his previous statements to the contrary, he granted her another extension until August 24, 1988. He advised her that there would be no further extensions. During the telephone conversation he recalled advising the Complainant that, in his view she was being unreasonably restrictive in her search for day care, and that she should have remained in Toronto seeking day care rather than taking vacation at a cottage. Mr. DesRosiers rejected the allegation that he denied the Complainant's maternity leave because she challenged the Office of the Assembly's decisions respecting sick leave and maternity leave. Mr. DesRosiers suggested that there had been a "valiant attempt" to meet her concerns.

Mr. DesRosiers was of the view that it would be impossible for the Office of the Legislative Assembly to re-employ the Complainant in view of the extensive letter writing campaign she undertook to the NDP members of the Opposition at the time. Mr. DesRosiers explained that upon hiring prospective employees are asked questions regarding their past political affiliations. They are asked specifically whether they are now, or have ever been, a member of a political party, whether they have ever worked for a political party or been associated in any way with a political party. At the interview it is explained to them that there can be no perception of bias of staff working in the Legislative Assembly, since their role is to serve all parties equally. When the Complainant contacted Mr. Cook about her grievances, she violated what Mr. DesRosiers described as the policy respecting political activity.

At the time of the hearing Ms. Cynthia Smith was the director of Research Services at the Legislative Assembly. She worked in various research positions over the years including the Ministry of Culture and Recreation, head librarian at Inco and assistant to the Dean at the Faculty of Library Science at the University of Toronto. In November of 1984 she became chief of the Legislative Research Service. She reported to Mr. Land and Mr. Gardner reported to her. Depending on the subject matter, research officers reported either to Mr. Gardner or to Ms. Smith. His fields of expertise were social policy, educational policy and health policy. Her fields were business, finance, history, general Ontario politics, Canadian politics and Government. In essence, she was responsible for everything

but those subjects Mr. Gardner handled. She described their responsibility as providing research for the approximately 130 members of provincial parliament.

She was involved in the decision to hire Ms. Wight. It was her evidence that during the interview for newly hired employees, questions are asked of the applicants concerning their past involvement with any political party: for example, speech writing, fund raising or participating in an active public role for a political party. During that interview they are advised that, as legislative research officers, they are to have no visible association with any political party that would affect the credibility and reputation of the service they provided to the members.

Ms. Smith was involved in the orientation of March 9, 1987 in which Ms. Wight elected to participate. Two new employees were to be orientated on that day and Ms. Smith invited Ms. Wight to attend although she could have waited until her first day of work on March 16, 19987. Ms. Wight elected to join the others and again the need for the being seen as non-biased and non-partisan was discussed. It was stressed that the research officers needed to avoid any perception of involvement with any political party and/or member. Ms. Wight was hired for her experience and training in health and social policy. Once she began working for the Legislative Assembly she demonstrated a particular interest in educational policy. Ms. Smith completed the two performance appraisals on the Complainant in 1987. She explained that the second one was done earlier than the required three month interval because the Complainant had requested vacation and the appraisal would have been due during her vacation time.

Ms. Smith's evidence with respect to the first discussions with the Complainant about her pregnancy are consistent with those of the Complainant. The Complainant advised her that she was pregnant and, Ms. Smith, in her usual manner, reviewed the manual of administration with the Complainant. She later had copies made of the relevant provisions and placed them in the Complainant's mail box. Ms. Smith described her discussion with the Complainant as routine, including the maternity leave policy in the Manual of Administration. She advised the Complainant to make an appointment to discuss the maternity leave with the Human Resources Department because it was within their

jurisdiction, not Ms. Smith's. They also discussed the fact that the Complainant had had difficulty with her first pregnancy and that she hoped she would not have the same trouble with this one. She advised Ms. Smith that she had been trying to get pregnant for some time and had at least one miscarriage. They discussed the fact that Ms. Smith had had similar difficulties with her pregnancy and had had miscarriages as well. The Complainant specifically did not tell Ms. Smith that she was expecting to have trouble with this pregnancy and, indeed, maintained that her expectation was that this one would be problem free. It was not until the meeting in late October that the Complainant described her pregnancy as high risk at which time Ms. Smith asked for a letter for the file to that effect. As well, they discussed the fact that the Complainant did not want to use the VDT's while she was pregnant. There were at the time two VDT's in the office and some of the research officers used them while others prepared their work in handwritten form. The Complainant was given the option of wearing a lead apron or manually doing her work for the secretaries to type. During that discussion Ms. Smith stated that there was no mention of the Complainant's pregnancy being high risk nor was their any discussion about using holidays to bridge a short-fall between her delivery date and her anniversary date.

Ms. Smith was asked about her comment to the Complainant to the effect that she was not very "big". Ms. Smith could not recall any particular discussion with the Complainant about maternity clothes. She described their relationship as cordial and friendly and noted that, because they both wore the same size, they frequently discussed clothes. She called them informal chats in the lunch room. Ms. Smith said that she and the Complainant had been accustomed to discussing clothes. The Complainant had beautiful clothes and they both liked shoes. They were having one of these discussions and Ms. Smith remembered that they had talked about the fact that they both wore the same size jacket. Earlier, Ms. Smith had told her that she did not have to wear maternity clothes with her first successful pregnancy until quite late in the eighth month because of her size. She could, in her words, absorb a large amount of being pregnant without showing. Ms. Smith suggested that if the Complainant inferred anything negative by the discussion, it was certainly not her intent. If Ms. Smith suggested that the Complainant was lucky by not having to wear maternity clothes, she meant it in reference to herself. At the time she was working at a private corporation and it would have

been very expensive for her to have to wear maternity clothes. She felt fortunate that she did not have to.

Ms. Smith testified that even before the Complainant advised her that she was pregnant, they had had conversations about tardiness. Ms. Smith explained that the core hours for the management staff were 9 to 5 with an hour for lunch. There were no specific coffee breaks. Lunch was flexible. If someone were involved in a project and worked beyond the set lunch hour time, they would take their lunch break when convenient. The deadlines for the assignments dictated how research officers did their work to ensure it was done within the specific deadlines. They could drink coffee all day at their desk but there were no specific coffee breaks. They did not have flex time. The Complainant never approached Ms. Smith about working flexible hours or reconstructing her work day. Had she done so, Ms. Smith would have consulted with the executive director, Mr. Land, although she conceded that he was opposed to flexible working hours.

The first discussion about her lateness took place in September, shortly after the beginning of the new school year. Ms. Wight arrived at work each day between 9:15 and 9:30 A.M. Ms. Smith asked her why she was late and was told that her young son was being persecuted by his peers in the school yard and the Complainant did not feel comfortable just leaving him there. She also said a problem had emerged between him and his teacher that needed to be resolved. Ms. Smith was satisfied with the reason but suggested that the Complainant deal with the issue as soon as possible. Ms. Smith said that her concern was not so much with the time that the Complainant was arriving at work but rather with the impact on the workplace itself. Calls for research information often come into the office before 9:00 A.M. by members of Parliament who were at their desks early. If the Complainant was free to arrive at work 15 or 20 minutes late on a regular basis, others would notice would feel that they, too, should have similar privileges. The result could have been that there would not be enough research officers at their desks to handle those early morning calls. Ms. Smith's concern was more with the overall operation of the department than the Complainant's personal situation. She assumed that the Complainant would resolve it herself. If there was any discussion about the Complainant using taxis, Ms. Smith maintains that it must have been within the context of a suggestion that the Complainant take a taxi to work from her son's school.

Concerning the criticisms of the Complainant's work in the latter part of 1987, Ms. Smith recalled an occasion in late October when the Complainant came into her office very upset and asked a number of questions about Mr. Gardner and, more particularly, his attitude towards children. The Complainant expressed concern about what she described as a deteriorating relationship. She told Ms. Smith that Mr. Gardner's attitude had changed towards her and that he had become unduly critical of her work ever since his return from his vacation in late September. She described to Ms. Smith a very heated series of meetings that they had recently had where his attitude was obvious. Ms. Smith decided that an open discussion between them was called for. The three of them met in Ms. Smith's office. The Complainant was very upset. Mr. Gardner was quiet. They discussed his concerns about the deterioration of her work. He told Ms. Smith that he had to virtually re-write one paper and make extensive revisions to another. At that time the Complainant advised them that the reason for the poor quality of her work was that she was experiencing a high-risk pregnancy. She felt the stress was having a great impact on her ability to handle her workload. Ms. Smith reviewed a current issue paper on education and concurred with Dr. Gardner's criticisms. She also reviewed a project on the *French Language Services Act 1986* and concurred with Dr. Gardner's view that it had no focus and required much more work. As a result of that meeting it was agreed that Ms. Smith and Dr. Gardner would cut back on significant projects for the Complainant. Ms. Smith explained that the work demand is driven by clients and it was impossible to totally eliminate any future work. However, it was agreed not to give the Complainant any complex projects that would involve extensive research. For example, the griever was assigned the health estimates project which, in Ms. Smith's opinion, is large in size but requiring very little analytical process. She described it as one of the simplest projects. There is very little research needed outside of the office. The research reference librarians provide the briefing books and any documents that might be required as well as the public accounts. Ms. Smith acknowledged that during this time both she and Dr. Gardner continued to assign work to the Complainant, although Ms. Smith checked the projects book to ensure that no significant projects had been assigned to her. Approximately every two weeks Ms. Smith checked the log book of assigned projects. Ms. Smith maintained that during the relevant time no significant or complex projects were assigned to the Complainant. The "over-view of Bill 8, *French Language Services Act*" project involved a review of work that the Complainant had done previously and would have simply involved reviewing work that she had already done. The

"demographic data, riding Etobicoke West" involved culling the data from the demographic data books prepared for each riding. The material is highly tailored and the work involved was relatively simple. Both of those projects had been assigned by Dr. Gardner, as was one on the "local availability of potential provincially owned sites for daycare centres" and "employment rights of epileptics." Ms. Smith could not comment on the complexity of those projects. Ms. Smith described other projects that had been assigned to the Complainant as descriptive, not analytical, "minimum pressure" projects involving telephone calls and reviewing previous work.

It was approximately two weeks later when Ms. Wight attended at Ms. Smith's office with a doctor's note certifying that her pregnancy was high risk. Approximately one week later, during the first part of November, the Complainant again appeared at Ms. Smith's office to advise her that she was not feeling well and that she probably had the flu. She told her at the time that she was concerned that Dr. Chu was not taking her seriously and she was very upset by her attitude. Ms. Smith had recently joined a medical clinic and had been very impressed with them and so she gave the Complainant the name of the clinic and of her own doctor. She suggested that the Complainant give them a call. She was subsequently told by the Complainant that she had, in fact, seen Dr. Deacon, who suggested she remain with her own obstetrician.

Problems with the Complainant's work continued and, in December, the office manager, Ms. Mickey Himel, complained to Ms. Smith that she had been handed a project by the Complainant that she was unable to complete. It consisted of a folder of handwritten and typed notes. Ms. Himel was bewildered and confused by it. She could not determine what to do with the documents and refused to type it for the Complainant. Ms. Smith reviewed the material and agreed with Ms. Himel that it was very disorganized, very unclear as to its focus and uncharacteristically messy. That paper concerned the health estimates current issues papers project which Ms. Smith described as requiring a simple process of reviewing the estimates. Her evidence was that the Minister's briefing books were provided to them two weeks before the estimates , as were the public accounts and, between the two, it would be very easy to distinguish the new initiatives. The material was compact in its presentation and was often assigned to new research officers because there was a minimum amount of research required.

In reviewing the file Ms. Smith had made several notations on it with yellow post-it notes and subsequently called the Complainant in to explain the material. Ms. Smith returned the folder to the Complainant and asked her to redo the outline and re-submit it by December 23, 1997. It was Ms. Smith's view that preparing a new outline would be the easiest way to refocus the Complainant's attention on the material. The Complainant offered to work over the Christmas break but Ms. Smith felt that she needed the rest and so it was agreed that the Complainant would complete it by December 23.

In January of 1988, Ms. Smith's office received a call from the Complainant advising them that she was in the hospital and that she would not be returning to work until the birth of her child. Later that same day Ms. Smith called the hospital and spoke directly to the Complainant. During that conversation the Complainant confirmed that she would be in the hospital for several weeks. No definite time was mentioned in that conversation about a return to work. She advised the Complainant at the time that there would probably need to be some documentation sent to the Human Resources Branch. In later discussions with the Complainant, she was told that the Complainant had received numerous telephone calls from that department and was feeling stressed. Ms. Smith told her that it would be in her own interest to complete the forms and ultimately called her doctor's office asking them to send documentation to the Human Resources Department. Ms. Smith testified that that was not normal practice but that she, as well as the Complainant, was receiving telephone calls about the forms and decided the most direct route would be to speak with the Complainant's doctor. Later that month Ms. Smith went to the hospital to visit the Complainant and bought with her a gardenia plant. The Complainant told her that she was allergic to plants and, in Ms. Smith's view, was very hostile towards her. She left the plant on the window sill and suggested that the Complainant ask the nurses to give it to someone in the hospital who would appreciate it. Ms. Smith described the visit as very uncomfortable. She noted that there was an "enormous" number of visitors for the person in the bed across from the Complainant and asked the Complainant if that was stressful or annoying.

It was at this time that Ms. Smith decided to delay giving the Complainant her next performance appraisal. She had previously prepared two very favourable performance appraisals and felt it would be unfair to do another one in these circumstances. She was hoping that delaying them would give the Complainant an opportunity to improve her performance thereby avoiding a negative appraisal.

It was also around early January that Ms. Smith hired a temporary replacement for the Complainant, Ms. Alison Drummond. Ms. Drummond had interviewed unsuccessfully for a position the previous fall. When it became clear that the Complainant would be off work for a considerable period of time, Ms. Smith reviewed to the list of applicants who had already been interviewed and concluded that Ms. Drummond would be the appropriate candidate. Ms. Drummond could work in the areas of research that the Complainant had been doing. The lack of office space required Ms. Drummond to occupy the Complainant's office. Ms. Smith therefore had to clean out the office of Ms. White's personal effects, which included clothing and shoes, makeup, dishes and plants. There were more personal effects than Ms. Smith had anticipated otherwise she might have stored them at the office. However, there was no locked cupboard to safekeep her personal effects and Ms. Smith decided that the safest thing would be to have Ms. Wight retrieve them. She asked the Complainant if her spouse could pick them up, which he subsequently did. Ms. Drummond's contract, in the normal course of events, would have ended at the end of the fiscal year, which is March 31, 1998. In considering how long to renew her contract, Ms. Smith took into the account that the Complainant would have at least 17 weeks of maternity leave requiring Ms. Drummond's continued employment until July. Ms. Smith recalled an earlier discussion with the griever in late September of 1987 during which her return to work arose. Ms. Smith reviewed the maternity leave provisions of the manual and commented to the Complainant that, although the business year was normally somewhat quieter over the summer, it was back to normal late September or early October of every year. At the time they did not have a formal legislative calendar and Ms. Smith based her comments on past trends and customs. In any event, by January Ms. Smith did not know when the griever planned to return to work but recalled that earlier discussion.

On March 22, 1988 the Complainant wrote to Ms. Smith advising her that she had given birth four days before her anniversary date of March 16, 1988. She requested the use of four holiday days to take her to the anniversary date, which would then entitle her to maternity and SUB benefits.

The letter went on to note that in September, when the Complainant notified Ms. Smith that she was pregnant, she consulted with Ms. Karen Scotland about using holidays to bridge a gap between the anniversary date and date of birth and was assured that that would be acceptable. In fact, the letter states that Ms. Scotland encouraged the Complainant to bank some holidays from 1987 in the event that she needed to use them. Ms. Smith was away when that letter arrived and Dr. Gardner forwarded it to the Human Resources Department. Ms. Smith stated that she had no discussions with the Complainant about her anniversary date or holiday days but had referred her to Ms. Scotland who had the knowledge and administrative authority to handle issues such as those raised in the letter. Other than her notations with respect to delaying the Complainant's performance appraisal, she did not have any discussions with Mr. Land about extending the Complainant's probationary period.

In April of 1998 the Complainant delivered two grievances to Ms. Smith about the denial of sick leave and the extension of the probationary period. Ms. Smith commented to the Complainant that she had never had a grievance before and, while she was aware that there was a formal process involved, she would have to review that process before she could respond. At the time Ms. Smith asked the Complainant whether she had any idea about when she would be returning to work. The Complainant said, with a hand gesture, "when all of this is finished" Ms. Smith interpreted that to mean when the grievances were finally resolved. It was at this same time that Ms. Smith spoke to the Complainant about partisan influences that had been enlisted on her behalf, particularly the letter to Mr. Cook. Ms. Smith had indirectly heard of the Complainant's letter to Mr. Cook. She reminded her to be very careful and that it was incumbent on a member of staff not to elicit partisan assistance for fear that it could prejudice the delivery of service. The Complainant assured Ms. Smith that she had not done so. By this time Ms. Smith had a much better idea of how busy her department would be over the summer months. It was an election year and the office was always quiet immediately before an election and the staff used the time to concentrate on current issues papers. The following

year, that is 1988, was a normal year and therefore much busier. They had received a significantly larger number of projects from individual members. There was a standing committee on finance and economic affairs that required much research. There was a constitutional hearing proceeding all through the spring and a select committee on the constitution was formed which occupied an enormous amount of staff time. In fact, two full time employees and one part time employee, including Ms. Drummond, were assigned to work with that committee. As well, in June or July of that year, they were mandated by the Board of Internal Economy to take over a completely new function, a review of all the regulations in the province. That immediately resulted in a backlog of 1200 legal opinions. In April, when Ms. Smith received the grievances from the Complainant, she was anticipating heightened committee activity from all of the committees referred to earlier. In addition there were two employees who would be taking maternity leave in the future. As well, there were vacations to schedule over the summer months.

Ms. Smith was referred to correspondence from the Complainant to the Clerk in July of 1988 in which the she suggested that Ms. Smith and she had discussed her return to work in October, in part because the pace of the Legislative Research Service was slower over the summer months. Ms. Smith did not recall that discussion. The only one she did recall was the one in September, before the birth of her child. Ms. Smith specifically stated that she did require the Complainant's services over the summer. She had a need for the services of somebody with expertise in social policy. The Complainant had been hired for her skills in that area. According to Ms. Smith, Ms. Drummond was initially hired to replace Ms. Wight. In June, Dr. Bedford, a political scientist, resigned. Another research officer went on maternity leave and Ms. Drummond was moved into Dr. Bedford's position. In July of 1988, therefore, Ms. Drummond was doing the work of Dr. Bedford and Ms. Wight. When Ms. Wight did not return, her position was filled at the end of September by a lawyer who was ultimately hired to deal with the backlog of questions regarding regulations. Ms. Drummond continued to do the research that would have been assigned to the Complainant but gradually began doing more in the other fields.

Ms. Smith was asked whether the Complainant's return to employment had been jeopardized by the fact that she contacted Mr. David Cook, Mr. Richard Johnson. Bob Rae, the Premier, and David Warner, another NDP, member. In addition, she filed an application for employment to the research director of the NDP. Ms. Smith stated that those contacts clearly indicate to her a partisan activity and interest that would preclude her from taking the Complainant back into research service.

Ms. Smith described the interview process for new staff. In the case of the Complainant, it was conducted by Ms. Smith, Dr. Gardner and Ms. Schoenberger. Apart from the questions regarding an individual's qualifications and experience, each interview consists of a set of questions that are routinely asked by one of the committee members. Those questions essentially deal with whether the person had ever been actively involved in any political party or whether they had written speeches, canvassed, solicited funds, or been visibly associated with any of the political parties in the province. If an applicant answers "yes" to any of those questions, the interview is formerly concluded. If they answer "no", it is explained to them that members of the research department are prohibited from having any partisan ties with any political party.

Dr. Robert Gardner earned his doctorate in psychology from McMaster University in 1981 and was employed for several years teaching psychology at McMaster and Guelph University and the University of Toronto. He joined the Legislative Research Service of the Legislative Assembly in January of 1984 as an Assistant Chief. At the time of the hearing he was the Assistant Director. His duties and responsibilities are equally divided between research and staff supervision and administration. His specialties concern issues relating to social policy, education and health care and he assigned and monitored the work of research officers engaged in research in that area. He was on the hiring committee who interviewed the Complainant and confirmed Ms. Smith's evidence that during that interview specific questions were asked with respect to the political history of each applicant. Specifically, they were asked whether they had been involved in partisan activity for any party. Dr. Gardner said that it was absolutely essential that the answer to all those questions be negative. He also confirmed that, during the orientation of new employees, partisan issues are discussed in more depth, with particular emphasis on the importance of always appearing to be absolutely non-partisan and professional in all of one's analytical work.

Dr. Gardner became aware that the Complainant was pregnant in the fall of 1987. He had returned from his vacation on September 22, 1987, and learned of her pregnancy some time after that. Shortly after his return from vacation he began to experience some concerns about the Complainant's work performance. In particular, he discovered that the current issue paper on educational issues was poorly organized with an unclear theme and focus.. He raised those matters with the Complainant several times. He made some suggestions as to revisions to the paper, many of which the Complainant rejected. When he suggested to her that certain areas of the paper were unclear or unorganized, she insisted that they were correct by explaining what she meant. Dr. Gardner viewed these concerns as being serious in nature and suggested that they discuss the matter with Ms. Smith. It was at that meeting that the Complainant advised them that she was experiencing a high- risk pregnancy, which was affecting her work. After that announcement there was very little discussion about the nature and quality of her work and more discussion about how they could limit the stress she claimed she was experiencing. It was agreed that no significant research projects would be assigned to her. It was also agreed that the Complainant would keep them informed of how she was managing the work load and whether she needed further assistance. Dr. Gardner denied having any discussion with the Complainant about maternity leave provisions and, in particular, banking holidays to achieve her anniversary date. Those issues were handled by Human Resources.

He reviewed some of the projects that had been assigned to the Complainant following that September meeting. The he described the French language paper as being of very simple requiring a few revisions to the original. The assignment to do the demographic data for Etobicoke involved reordering some of the data that had been provided to them. It was a one-page memo and would have required a limited amount of effort. With respect to the assignment regarding possible sites for daycare centres, Dr. Gardner testified that the Complainant had considerable background in daycare and in her previous work experience and in her analytical experience as a researcher. She was the obvious person to do the assignment and Dr. Gardner asked her if she felt it was appropriate, given their discussion about her high-risk pregnancy. The assignment involved a few telephone calls to Ministry officials in Community and Social Services and perhaps to local people about daycare centres in particular locales. Given the Complainant's background, the level of difficulty was very

low. Dr. Gardner could not remember the project regarding the employment rights of epileptics, although, because it was only a three-page memo, he assumed that it would have required little research. With respect to the health estimates project he assigned the Complainant in November, Dr. Gardner stated that the estimates were a stage in the budgetary and fiscal accountability process. Ministries are required to answer to standing committees and are subjected to discussions about their spending plans. Research officers prepare background papers for members summarizing issues relative to the particular Ministry, including any controversies that might have arisen about internal Ministry reports of fiscal concerns and major briefing books prepared by the Ministry. The project involved the synthesis of a considerable amount of material, especially for bigger ministries like the Ministry of Health. It did not, however, involve sophisticated analysis and Dr. Gardner testified that it was not onerous work. He thought that this project fit well within the framework of a reduced work load. It drew upon the Complainant's area of expertise of the concepts, literature and issues. It was not a high pressure project with immediate deadlines. It was a flexible assignment that could be done over a period of weeks.

Although he did not assign the project on auto insurance personally, his evidence was it would have been based on research that the Complainant had done earlier and therefore the project should not have been difficult for her. The assignment was made on November 23, 1993 and was delivered on the same day. On December 2, 1987, Dr. Gardner assigned the Complainant a project on adult education and unemployment. It was given to her because it was a paper for the French Language Parliamentary Association, the focus of which was very similar to work done by the Complainant in an earlier education current issue paper. It was a matter of using the expertise and material that a research officer had gained from earlier projects to speed along new projects. Given that the Complainant had done the research, was familiar with the area and an adaptation of earlier work, Dr. Gardner described it as of limited difficulty. It was entirely consistent with their approach to her condition. Problems, however, resulted from that assignment. Dr. Gardner had concerns with respect to organization, clarity and quality. The Complainant, however, felt that the problems were not with the work but with the working relationship between them. She felt that his criticisms were unfair and unfounded. They avoided the issue by agreeing that, from that point on, the Complainant's projects would be reviewed by Ms. Smith, not by Dr. Gardner.

In January of 1988, Dr. Gardner prepared a memo for the Complainant's file about what he described as "work problems." He set out some of the projects he felt the Complainant had completed in an unsatisfactory manner. He noted that the estimates project was ultimately passed on to Ms. Drummond in a very disorganized state and that it took a great deal of work for Ms. Drummond to salvage it. He documented his views that, although they assumed the Complainant would return to work in good health and performance would no longer be an issue, in the event there continued to be problems, he felt their concerns should be documented. It was Dr. Gardner's evidence that during the summer of 1988 two political scientists left the department, one in May and one in June and a lawyer in June or July. Considering that there are fifteen research officers in total, a loss of three was significant. The loss of two political scientists was serious in terms of routine public policy and public administration inquires. As well, work with the various committees was increasing, which was the most intense work a researcher could be assigned. Much of the work that the Complainant had specific experience and expertise in was ultimately assigned to two new people without the necessary background, thereby increasing their workload.

In cross-examination Dr. Gardner agreed that he found out about the Complainant's pregnancy in September but denied knowing that it was a high-risk pregnancy at that time. He agreed that he had done sufficient research in the area of women's health issues, most particularly midwifery, to understand the seriousness of a high-risk pregnancy. He first learned that the Complainant's pregnancy had been categorized as high risk in October, thus, prompting he and Ms. Smith to avoid assigning her any significant research projects.

Ms. Ellen Schoenberger is the Director of Human Resources for the Legislative Assembly. Before that she had worked as a manager for the administration of the City of Toronto, non-profit housing corporation, was a manager with an international management consultant firm and held various administrative positions in Switzerland. Her responsibilities in her capacity as Director of Human Resources included administering and developing policies concerning human resources at the Legislative Assembly. She referred the Tribunal to minutes of meetings of the Board of Internal Economy, specifically minutes dated of October 11, 1977, in which comment was made with respect

to the independent position of the employees of the Office of the Assembly. The minutes went on to state that, due to the special circumstances and working conditions of these employees, they should not be equated with ministry employees and, therefore, matters relating to salaries and classifications should be determined by the Board rather than applying civil service standards. She explained that the Manual of Administration respecting the Legislative Assembly consists of three volumes; General Administration, Personnel, and Employee Benefits. The forward to that Manual stated in part as follows:

> The Manual has been prepared in order to provide Members of the Legislative Assembly, Officers and the Employees of the Office of the Assembly and the three party caucuses with a comprehensive reference source in all administrative aspects of the operation of the Legislature.
>
> All policies and/or procedures contained in these volumes:
>
> 1. have been approved by the Board of Internal Economy and/or the Speaker;
>
> 2. are in accordance with the provisions of the The Legislative Assembly Act, related statutes or the minutes of the Board of Internal Economy;
>
> 3. have been reviewed by the provincial Auditor and found to accurately reflect those commonly accepted for efficient and effective management of the public purse in the Province of Ontario.

That forward was signed by Mr. John Stokes the then Speaker and Chairman of the Board of Internal Economy and Mr. Robert Fleming, Director of Administration and Secretary of the Board of Internal Economy. A copy of the minutes of the meeting No. 9/80 of the Board indicated that it was moved and seconded that the Board approve, as written, the personnel procedures for the Office of the Assembly for inclusive in the Manual of Administration and required that all proposed amendments be brought to the Board for approval.

The Manual of Administration includes a grievance procedure. The final decision with respect to grievances dealing with working conditions is the Speaker of the House. The Manual of Administration also showed that policies regarding maternity leaves, leaves of absence and sick leave

had received the approval of the Board of Internal Economy and the Speaker and formed part of their policies. Indeed, on the conditions of employment signed by the Complainant in March of 1987 is a qualification which states as follows:

> The whole of the foregoing is subject to regulations which maybe established by the Speaker of the Legislative Assembly from time to time to regulate employment in the Office of the Assembly.

That qualification referred to policies and procedures, classifications, salary ranges, employee benefits and anything else that was included in a Manual of Administration, including the grievance procedure.

Ms. Schoenberger was on the interview committee when the Complainant applied for her position. She confirmed that questions regarding the past political activities and affiliations were asked and answered in the negative by the Complainant. Ms. Schoenberger testified that the Complainant's start date was March 16, 1987 and that only after her termination was it suggested that her start date might have been March 9, 1987. At no time during any of the grievance meetings including those with the Speaker and the Clerk, did the Complainant ever take the position that her official start date was March 9, 1987.

At the relevant time the maternity leave provisions for the Legislative Assembly were handled by the Human Resources Branch and, in particular, Ms. Karin Scotland, who was the Senior Benefits Officer. In order to be eligible for paid maternity leave, an employee had to have completed one year of service as of the date the maternity leave began or, at the latest, the date of delivery. Ms. Schoenberger testified that the Legislative Assembly has managed numerous maternity leaves in its time. The library specifically contains the largest employee component and that division is 90% female. In all of that time, as far as Ms. Schoenberger's was aware, no one had ever been allowed to bridge a gap in service to fill in the gap between the date of delivery and anniversary date. She denied every having a conversation with Dr. Gardner, Ms. Smith and the Complainant in which the Complainant was told she could bank her holidays to reach her anniversary date.

On January 11, 1988, Ms. Schoenberger sent the Complainant a memorandum about maternity leave without pay. In that memo she confirmed a conversation the Complainant had with Ms. Scotland regarding absence due to complications during pregnancy. She advised the Complainant that employees with less than one year of service were not eligible for maternity leave with supplementary unemployment benefit allowance (SUB). Ms. Schoenberger enclosed with that letter a copy of the Manual of Administration setting out the maternity leave provisions. She explained that she included the Ontario Public Service policy in her memo because she knew that the Complainant had already been given the Legislative Assembly policy and had made enquiries of Ms. Scotland about the OPS policy. Ms. Schoenberger felt that it would be a good idea to include a copy of them in her memo. Also included with that memo was a Legislative Assembly Request For Leave Of Absence Form. Ms. Schoenberger had added the Complainant's name and section and the following "I wish to take maternity without pay leave from January 4, 1988 to May 1, 1988 (17 weeks). The form was signed by Ms. Schoenberger and dated January 11, 1988. In handwriting on the form was a note from Ms. Schoenberger that said "sign both copies and return when approved I'll send you back."

Ms. Schoenberger completed the form in that manner because by then they knew that the Complainant had been hospitalized due to pregnancy complications and that time was eleven weeks prior to the estimated delivery date allowing them to begin her maternity leave without pay.

Also included with that memo was an agreement to continue benefits while on leave without pay. The dates on the form were January 4, 1988 to May 1, 1988 (17 weeks) and various benefits were ticked off in the "yes" column, including basic life insurance, supplementary life insurance, dependent life insurance and long term income protection. It was noted on the form that in order to continue benefits the form would have to be completed and Ms. Schoenberger had written at the bottom "please sign, date and return, I'll send you original". That was the same form that would have been used for anybody who was on a leave without pay, including educational leave.

Ms. Schoenberger was shown a letter written by the Complainant which included a note from Dr. Zaltz certifying that the Complainant was unable to work due to complications of her pregnancy and

that she would be unable to return to work prior to the birth of her child. Ms. Schoenberger wrote on the covering letter the following:

> Since the doctor states clearly that her illness is due to pregnancy complications, she would not qualify for STSP. It is doubtful. We should send it to John Laberge and ask for his opinion in writing. The note was signed KS, that is Karin Scotland and was intended for Ms. Schoenberger.

Ms. Schoenberger explained that by that time the question of whether the Complainant was eligible for short term sickness benefits had arisen and, while it appeared on the face of the policy that she was not, Ms. Schoenberger decided to ask Mr. Laberge, the Senior Benefits Consultant at Management Board to confirm her interpretation.

On February 17, 1988, Ms. Scotland received a memo from Mr. Laberge advising her that the Complainant was not eligible for short term sick leave as there was no illness involved and the Complainant was remaining at home as a preventative measure. Ms. Schoenberger sent a memo to the Complainant on February 24, 1988 advising her of Mr. Laberge's opinion and providing her with a copy of it. Her memo went on to note that it was important there be official authorization for her continued absence and a request that she sign and return the request for leave forms as soon as possible. On that memo was a handwritten note signed by Ms. Scotland to Ms. Schoenberger which stated:

> "I called Connie today and asked her when I will receive her papers. She said she will call you today!"

On March 1, 1988, Ms. Schoenberger was advised of a memo from the Complainant to Ms. Smith requesting maternity leave according to the Ontario Public Service (OPS) policies beginning March 16, 1988. On that memo was a handwritten note from Ms. Scotland dated March 7, 1988 which said:

> "Talked to Connie telling her to send in papers re: her LWOP and that she is away without authorization. She told me she will apply for discretionary leave and wouldn't sign the papers I sent her since it says maternity leave without pay on

> them. When I told her she is jeopardizing her position not applying for a proper leave, she hung up on me."

Two subsequent notations on the memo from Ms. Scotland indicate that she left messages for the Complainant on March 8 and 9, 1998.

On March 9, 1988 the Complainant wrote to Ms. Schoenberger about her request for a leave of absence. The Complainant stated:

> "I feel it is inappropriate for me to be placed on maternity leave as of Jan. 4, 1988, the date of my admission to hospital, as I did not have the baby and as I was clearly too ill physically and emotionally to perform any duties.
>
> In a Feb. 2, 1988 letter provided to Ms. Schoenberger by my physician, he makes it clear that I could not perform my duties due to an incompetence of the cervix, a medical diagnosis which jeopardized my physical and emotional-well being as well as the life of my child.
>
> Pending a resolution of an appeal by Mr. J. Laberge's interpretation of my request for sick leave from Jan. 4 to March 16, 1988 I would like the time spent in hospital and at home regarded as a leave of absence."

With that memo was a Request for a Leave of Absence form from the Ontario Legislative Assembly dated March 9, 1988 which stated as follows:

> I wish to take leave*** from January 4, 1988 to March 15, 1988.
>
> This period is more than the total of vacation/attendant credits in my account.
>
> If not able to return on the above date I will notify my supervisor by the fastest means possible. *C. Smith notified as of March 1, 1988 regarding request for maternity leave Mar. 16, 1988.

The asterisks referred to above were referenced below as follows:

> I am completing this form as I was advised on March 7, 1988 by Karin Scotland, Benefits/Personnel Officer, Human Resources Branch, Legislative Assembly, that

> if I do not do so, I will "jeopardize my job". I am doing this without prejudice to my right to appeal the denial of sick leave.

Ms. Schoenberger testified that this was the third version of the original form sent to the grievor on January 11, 1988. The date had been changed, as well as the reference to maternity leave without pay.

Based on the discussion that they had previously in which the Complainant had suggested she take discretionary leave, Ms. Schoenberger amended that form to read "discretionary leave without pay" and "March 15, 1988" to read "as required (baby has been born on March 10, 1988)". Ms. Schoenberger highlighted the changes she made with a yellow marker so that the Complainant would be aware of them.

On March 22, 1988, the Complainant wrote to Ms. Smith advising her that she had given birth on March 10, 1988 and that she would like to use four of her holidays to reach her anniversary date which would then entitle her to the maternity and SUB benefits. Her note went on to say that she had consulted Ms. Scotland about using holidays to do so and had been assured that was acceptable. Ms. Schoenberger wrote a note on that memo to the effect that "info given by Ms. S. was different." She subsequently wrote a memo to the Complainant on March 29, 1988 which advised her that the Clerk had approved her request for discretionary leave without pay with the added condition that she would be on probation for a year after her return to work. Ms. Schoenberger stated that it was customary to extend probationary periods by at least the length of a person's absence if it fell in the probationary year. The memo concluded by noting that employees on leave of absences did not accrue vacation credits.

When Ms. Schoenberger changed the application for leave form to discretionary leave without pay she believed that was in the best interest of the Complainant. The original maternity leave would have been 17 weeks from January 4 to May 1, 1988, whereas the discretionary leave without pay would have been from January 4 until July 4, 1988, more than the original seventeen weeks allotted.

The Complainant continued to believe she was entitled to short term sick leave. She notified Ms. Schoenberger that she would be seeking the opinion from the Human Resources Secretariat. Ms. Schoenberger told her that the sickness policy originated at the Human Resources Secretariat and suggested that she make inquiries with them about the fairness of the policy. Ms. Schoenberger was not aware that the Complainant had taken her case to the Deputy Minister of the Management Board or the Human Resources Secretariat but ultimately was advised that they had received a legal opinion contrary to that given by Mr. Laberge. The new opinion was that the previous application of the policy could be deemed as discriminatory. They recommended that short term sick leave be granted and Dr. Todres recommended that the policy be applied so that the Complainant would eligible for and did receive short term sick leave benefits to March 10, 1988, the date of her delivery.

Ms. Schoenberger was the second stage in the grievance procedure initiated by the Complainant. Grievances were submitted to her on May 6, 1988 and on May 12, 1988 she responded to those grievances as follows:

1. Sick Leave Benefits

> As you know, the Legislative Assembly is bound by and part of the same benefit policies as are in place throughout the Ontario Public Service and both the Legislative Assembly and the Ontario Public Service Manuals of Administration state:
>
> The absence of a pregnant employee, due to illness or injury prior to the commencement of or following maternity leave, may be charged to the Short Term Sickness Plan providing an employee is prevented from performing her duties due to illness or injury and there are days remaining in the employee's Plan. Where a doctor recommends that a pregnant employee remain at home and as a preventative measure prior to the date of her maternity leave is to commence, but where there is no illness involved, benefits under Short Term Sickness Plan do not apply.
>
> Your Dr. A. Zaltz did confirm on February 2, 1988 that you were unable to work due to pregnancy complications, and we, therefore, must apply the above regulations.

You were granted authorization by the Clerk of the House for a discretionary leave of absence without pay. The Manual of Administration states in Volume 3, part 2 (F) (5) (1):

> an employee on discretionary leave without pay is not entitled to benefits under the Short-Term Sickness Plan."

2. Access to Maternity Leave

You have not been improperly denied access to maternity leave:

Manuals of Administration (and the Employment Standards Act of Ontario - Part XI, Section 36 (1) states that an employee is entitled to maternity leave after having been employed by her employer for a period of at least 12 months and 11 weeks immediately preceding the estimated date of her delivery.

"You came to the Legislative Assembly on March 16, 1987 and started your leave due to pregnancy complications on January 4, 1988 when you had been employed only 9 1/2 months.

I trust that this further clarification of the rules and regulations that govern employee benefits in the Ontario Public Service and the Legislative Assembly is useful to you."

An attached letter regarding the extension of her probationary period grievance stated in part as follows:

> The normal period of probation is 12 months, as you know. It is customary to extend the probation of a new employee when probation is interrupted by a lengthy absence due to illness, pregnancy or whatever other leave. Probation can also be extended if there has been a change in supervisors or any other unforeseen circumstances. This is entirely discretionary on the supervisor's part.

Ms. Schoenberger was asked why she made reference to both the Legislative Assembly policies and the OPS policies in her reply to the grievance. Her answer was that because she had sent the Complainant both policies, she wanted to make it clear that the policies read exactly the same, as did most of the benefit policies.

In June of 1988, Ms. Schoenberger received a copy of a memo to Mr. Laberge from Mr. Stoodley, general counsel, which included a memo of law about the short term illness plan and maternity leave. It was Mr. Stoodley's conclusion that the Complainant's claim under the short term sickness plan should be recognized. However, her request for maternity leave had been properly denied.

There had been discussions between Ms. Schoenberger, Ms. Smith and Mr. Land about the Complainant's return to work. In particular they had discussed the fact that they had heard nothing from her which prompted the letter of July 4, 1988 advising the Complainant that the 17-week leave of absence would be concluding on July 7, 1988 and that her leave was being extended to July 18, 1988 when she was be expected to be back at work. At about the same time a memo was sent to the Director of Finance advising him that the Complainant was eligible for sick leave pay for the period of January 4 to March 10, 1988 at the rate of six day's pay at 100% and 42 days at 75% of her salary. The memo also suggested that interest should be applied on that payment, although the Complainant asserted at the hearing that she never did receive any interest.

In cross-examination Ms. Schoenberger agreed that she consulted on a regular basis with senior benefits branch with respect to human resource matters whenever there was an ambiguity or question of interpretation. They consulted with them because they were a very large operation while the Legislative Assembly had much less experience in these matters. She testified that their maternity leave provisions were essentially the same as OPS except for the fact that their policies did not refer to the *Public Service Act* or the Deputy Minister. The Clerk had the rank and status as a Deputy Minister and, as such, had the same powers as a Deputy Minister with respect to leaves of absence including maternity leave, service, anniversary date, SUB allowance . Those plans were, in substance, the same as that of the OPS, as were vacation entitlement, short term sick leave, job security, pension and discretionary leave provisions.

She was referred to a letter she wrote on May 12, 1988 to Ms. Wight in which she stated that the Legislative Assembly was bound by and part of the same benefit policies as the OPS and quoted

the OPS and the Legislative Assembly administrative manual with respect to those benefits. When it was suggested to her that it was her belief that the Legislative Assembly was bound by the policies of the OPS, Ms. Schoenberger objected to such a broad characterization. She stated that according to the *Legislative Assembly Act* they are bound by the same health and benefit policies as are in place in the OPS unless they establish their own policies which they have not done.

Ms. Schoenberger was asked about the denial of sick leave policy due complications due to pregnancy. She sought Mr. Laberge's advice because she felt that the denial of sick leave benefits seemed harsh in the circumstances. When the second opinion was received suggesting that the Complainant should be paid sick leave, Ms. Schoenberger encouraged Mr. DesRosiers to adapt that ruling. It was her suggestion that not only did the previous application seem discriminatory but also politically incorrect in this age of employment equity. This was the first time the Legislative Assembly had to apply the policies directly and it was Ms. Schoenberger's view that they were unfair and that a pregnant woman, whatever the reason for her illness, should receive sick leave benefits during her pregnancy.

Ms. Schoenberger was asked whether she spoke to the Complainant while she was in the hospital. Ms. Schoenberger recalled speaking to her once, perhaps twice. When it was suggested to her that she called on January 11, 1988 to ask for the leave of absence forms and to advise the Complainant that she was not eligible for maternity leave, Ms. Schoenberger agreed that she might have called on that date. It did not occur to her at the time that her telephone calls would be seen as harassment. Her calls were, in her view, by invitation. Ms. Scotland, who had been speaking with the Complainant, had advised her that she should speak to Ms. Schoenberger and the Complainant never objected. It was also Ms. Schoenberger's belief that the Complainant had telephoned the office several times and spoken with Ms. Scotland numerous times. She did not have the impression that these were unwelcomed calls. Somebody, although Ms. Schoenberger could not remember who, gave her the Complainant's telephone number at the hospital, which she saw as an invitation. Although that she agreed she was calling the Complainant with bad news, it was her view that she had to make it clear to the Complainant about proper procedure.

Ms. Schoenberger was asked why she made repeated requests for the Complainant to fill out the leave of absence forms knowing that she was in the hospital attempting to prevent a premature birth. Ms. Schoenberger's reply was that Ms. Wight had received many visitors and had made telephone several calls during her confinement. Ms. Schoenberger did not think she was in isolation and did not think she was unable or unwilling to receive calls or visitors. She did not think that it was an inappropriate time to straighten out their business dealings. Although she conceded that nothing catastrophic happened as a result of the delay in signing the forms, she was concerned that the payroll system would automatically eliminate the Complainant from the roster because there had been no activity on her file for a period of time. She said that it was an automatic reaction to a lack of information in the computer system.

She was asked if she realized that by placing the Complainant on maternity leave on January 4, 1988, she would be required to return to work on May 1, 1988, approximately six weeks after the baby was born. Ms. Schoenberger acknowledged that would have been the case but noted that the Complainant could have asked for discretionary leave without pay. It was pointed out to her that discretionary leave was not automatic and that, in fact, when the Complainant did ask the Clerk to exercise his discretion and grant her discretionary days to bridge the period between her date of birth and anniversary date, she was refused. Ms. Schoenberger replied that the denial was based on the fact that the griever did not have the required service. It was her view that you cannot bridge service you do not have. When she was reminded that the Complainant was also denied an extension of her leave in August and ultimately terminated because of her failure to return to work, Ms. Schoenberger suggested that the circumstances were very different.

Ms. Schoenberger was asked whether the Complainant had, in fact, jeopardized her job by refusing to sign the leave of absence request forms. Ms. Schoenberger pointed out that two months had elapsed and by now the computer system would have automatically rejected the Complainant. As well, according to Ms. Schoenberger, the Complainant had consistently refused to recognize her employer's position as to the nature of the leave and had intentionally refused to sign the forms for that reason. It was her view that was what prompted Ms. Scotland to frame

it in those terms. Ms. Schoenberger reminded Commission counsel that ultimately her request for discretionary leave without pay was granted and the 17-week statutory maternity leave commenced the day the baby was born rather than January 4, 1988. Ms. Schoenberger was asked whether she ever considered the Complainant to be eligible for sick leave immediately after the date of the delivery of her child. Her response was "no". It was suggested to her that if an employee had appendicitis, was hospitalized, and had the appendix removed, he/she would continue to be on sick leave after the appendectomy. Ms. Schoenberger agreed that the person would continue to be ill and entitled to short term sick leave benefits. They would continue as long as the doctor considered it necessary.

It was pointed out to Ms. Schoenberger that the abandonment of a position was defined in the administration manual as:

> "abandonment of a position is the term used when an employee of the Office of the Assembly is absent from duty without official leave of absence for a period of two weeks and is declared in writing by the Director of Human Resources to have abandoned his or her position. The Director of Human Resources shall deliver to the employee at his or her last known address a letter either by registered mail or by hand stating that he or she has abandoned his position."

She was reminded that the Complainant did not report to work on August 24, 1988 as ordered and the letter terminating her employment was dated the same day. She was asked why she did not wait the two weeks referred to in the policy. Ms. Schoenberger testified that originally she had been ordered to return to work on August 9, failing which she would be deemed to have abandoned her position. Mr. DesRosiers extended that to August 24 and the decision was made that if she did not return to work on that date, she would be deemed to be away from work without authorization and not interested in returning. Ms. Schoenberger suggested that this situation was different from that envisioned in the policy in which somebody failed to report to work for a period of two weeks without explanation. In this case the Complainant had been directed very clearly to return by a certain date and when she did not, that failure was evidence of her intention not to return.

When it was suggested to Ms. Schoenberger that the Legislative Assembly actually saved money by the Complainant's absence, she disagreed. She did agreed that as a result of their decision they did not have to pay any SUB benefits and that her replacement was paid at a lower level than the Complainant. Nevertheless, Ms. Schoenberger was not prepared to agree that there were any overall savings to the department since the entire workload had been affected. Work had to be shuffled to various people and replacements had to be made. She also denied Commission counsel's suggestion that the Complainant was not needed at work. Ms. Schoenberger was aware of the staff shortages and increased workload. It was also suggested to Ms. Schoenberger that the computer system did not necessarily reject employees who did not complete the appropriate forms. She conceded that there were individuals who were responsible for the data that was entered into the computer who had ultimate control over what it did. However, she suggested that it was very complicated to override the system. Her concern was that once the computer eliminated somebody from the staff list, everything, including the employee's benefits and service review date were eliminated. Reinstating somebody in the circumstances is very complicated. She conceded that the system had not rejected the Complainant between January 4 and March 10, 1988, but suggested it was probably because Ms. Scotland kept payroll informed of the situation and specifically asked them to wait.

It was suggested to Ms. Schoenberger that the sick leave and maternity leave provisions and policies of the Legislative Assembly were interpreted in such a way as to disadvantage the Complainant. Ms. Schoenberger agreed that was the result but denied any suggestion that they were intentionally interpreted in such a manner.

Ms. Karin Scotland joined the Legislative Assembly in January of 1975 as a receptionist. She gradually assumed greater and greater responsibilities so that, in and about, 1980 she was responsible for the administration of benefits at the Legislative Assembly. That responsibility included sick leave and maternity leave benefits. As she understood the policy at the time, the latest a woman could begin her maternity leave was the date of delivery. The earliest was eleven weeks before the due date. She was asked to explain what circumstances would allow a pregnant woman at the Legislative

Assembly to use vacation during her pregnancy. She explained that many women preferred to have more time at home after the birth of the baby and it was not unusual for them to use vacation prior to the birth so that they could save all the maternity leave for the post-partum period. She denied ever having a discussion with the Complainant in which she agreed that she could bridge a gap in service between the birth of the baby and her anniversary date. As far as she was aware, that had never happened at the Legislative Assembly. When it was suggested to her that she had a conversation with Ms. Wight about using her vacation, Ms. Scotland opined that she might have advised her to use her vacation before the delivery date. She stated that she would never had advised her that she could make up any shortcomings in her service in order to meet her anniversary date.

In cross-examination Ms. Scotland agreed that she had contacted the Complainant while she was in hospital in an effort to complete the leave of absence and continuation of benefit coverage forms. Ms. Scotland's memory of the actual events was very poor. She could only recall events by reading the various notes and memos on the file. She did testify, however, she did not realize that her contacts with the Complainant were upsetting and stressful. She described her actions as standard procedure. She was concerned that the Complainant's benefit coverage continue while she was off and stressed the need for official authorization for leaves of absence.

She was asked why she sought an opinion from Mr. Laberge about policies respecting the Legislative Assembly. She stated that, although she understood the policies, whenever she wanted additional assurance that she was interpreting or applying them properly, she would ask Mr. Laberge or Ms. Schoenberger for their opinion. A far as she was concerned, their policies and benefits were equal to the OPS, as were their applications.

Mr. Edighoffer was the Speaker of the House from 1985 through to 1990. As part of the grievance procedure of the Legislative Assembly, he convened a hearing with Mr. Moore, Ms. Wight, Ms. Schoenberger and his assistant, Harold Brown to discuss her maternity benefits. Although he agreed he had the discretion to relieve against the strict application of the one year requirement, he felt that there were insufficient reasons to make an exception in this case. His concern was that once an

exception was made, it became the rule. He could not recall whether he knew at the time that the Complainant had accrued vacation and MCO days at the time of her termination. In any event, his understanding was that, in order to be eligible for maternity benefits, an employee would have had to work a year before the delivery date. Even though he did have the discretionary power to grant a leave of absence in exceptional circumstances, it was his view that, in exercising that discretion, precedents would be set that would be problematic in the future. Mr. Edighoffer attempted to bring the Complainant's situation before the Board of Internal Economy in the fall of 1988 but, although it was placed on the agenda, it never was discussed.

SUBMISSIONS FOR THE COMPLAINANT

Ms. Folkes-Abrahams began by reminding the Tribunal that, before Ms. Wight, the short term sickness plan was denied to a woman in the public service or the Legislative Assembly with pregnancy related illness pregnancy. It was the submission of counsel that, despite Ms. Schoenberger's stern manner and strict adherence to policies which discriminated against women, Ms. Wight showed fortitude and determination. She was not deterred by the Clerk or the Speaker's unflinching desire not to create a precedent. She also pointed out to the Tribunal that counsel for the Respondent attempted unsuccessfully throughout the hearing to smear Ms. Wight's character through her own doctor, Dr. Januszewska, by suggesting that Ms. Wight had a personality disorder. Dr. Januszewska suggested that Ms. Wight had an obsessional personality which she described as simply a personality style and not a personality disorder as Mr. Hayter has suggested. Dr. Januszewska described the obsessional personality as someone who is meticulous, very well organized, punctual and hard working. It is a person who needs to be in control, to get things done on time and is loyal. Dr. Januszewska suggested that 90% of doctors have an obsessional personality and that it is that obsessional trait that makes them successful. The evidence has shown throughout that Ms. Wight was quite organized. She kept meticulous documents and notes that carefully followed the Legislative Assembly through its denial of her rights. Respondent's counsel portrayal of Ms. Wight as having a personality disorder is simply incorrect.

Commission counsel took the position that the Legislative Assembly discriminated against the Complainant on the basis of sex by denying her benefits under the sick leave plan for pregnancy

related illness, denying her benefits under the maternity leave policy of the Legislative Assembly and by interpreting the policy regarding eligibility requirements in such a way as to deny Ms. Wight's benefits under that policy. Their interpretation of the policy discriminated against the Complainant directly but also had an adverse impact on women generally. The Legislative Assembly discriminated against Ms. Wight when they, specifically the Speaker and the Board of Internal Economy, refused to exercise their discretion in favour of granting the Complainant maternity leave. Their rigid application of the policy had an adverse impact against women.

The Legislative Assembly also discriminated against Ms. Wight by offering an employment contract and benefits package that was unequal in its provision of benefits to women. It was also discrimination when they imposed a greater period of probation upon Ms. Wight because of time missed due to her pregnancy related illness.

Commission counsel briefly reviewed the facts leading to the complaint. The complaint was filed on September 28, 1988, alleging discrimination in employment on the basis of sex, family status and handicap. The complaint also alleged adverse impact discrimination and harassment. Notwithstanding the fact that the Complainant commenced her employment on March 16, 1987 as a research assistant in the office of the Legislative Assembly, the fact is that the Complainant attended an entire day of orientation on March 9, 1987. She was not paid for the day and the day was not credited to her. The Commission took the position that day should have counted as part of her employment. Indeed, it took the position that the Complainant's employment started on March 9, 1987 instead of March 16, 1987.

The Complainant received two excellent performance appraisals and was considered to be a good employee prior to her pregnancy. A very different picture was presented to the Board following her pregnancy and related problems. There were criticisms of her work and there was a marked difference in attitude towards her and her work. It was the Commission's position that these criticisms of the Complainant arose as a direct result of her pregnancy and were caused by the Respondent's refusal to accommodate her condition. Dr. Gardner and Ms. Smith claim that they

made attempts to accommodate the Complainant but a review of the work assignments following her return to work indicates that is simply not the case. They knew that she was a high risk pregnancy and it is clear from their criticisms that she was unable to complete the work assigned to her. On the one hand they claim that they did accommodated the Complainant while on the other hand they insisted that she never asked for accommodation. Their failure to accommodate her created a hostile environment and added pressure on the Complainant to attend at work even when she was legitimately sick. It is settled law that employers are required to accommodate pregnant women. Discrimination on the basis of pregnancy is discrimination on the basis of sex. The motives or intentions of Dr. Gardner and Ms. Smith are irrelevant. It is the effect of what they did that resulted in the discrimination. The Complainant was obviously in need of accommodation and instead she was given the same or more duties to perform. The log book bears that out. After October of 1987 the Complainant received more assignments than she had received prior to that date. Even if this Board should accept the Respondent's evidence that they were unaware of the Complainant's condition until October of 1987, there was no attempt at accommodation after they were made aware of the situation. Further, the Commission took the position that the Respondent's rigid application of their policy that all assignments had to be completed within the time frames allotted resulted in direct discrimination against the Complainant and adverse impact discrimination generally. The criticism that the Complainant received as a result of her inability to complete the assignments amounted to harassment.

Once the Commission has established a prima facie case of discrimination, as it has in this case, the burden shifts to the Respondent to show that they accommodated the Complainant or that they could not have accommodated her without due hardship. There was no evidence in these proceedings that the Respondent could not have accommodated Ms. Wight.

The essence of the complaint is that the Complainant was discriminated against on the basis of sex. The first example is the refusal of the Respondent to allow her access to the short term sickness plan followed by the denial of maternity leave benefits. When the Complainant was hired she was told that she would be on probation beginning March 16, 1987. The employment contract she signed provided

for a short term sickness plan of six days at full pay and up to 124 days at 75% of her pay. Those benefits are renewed annually. In addition MOC days, vacation or over time credits may be used to supplement those credits to allow an employee to receive full pay. Following that short term sick leave plan, employees are eligible for a long term income protection plan. The employment contract also provided for maternity leave. In order to be eligible an employee had to be employed for one year. That maternity plan allowed for a leave of absence for pregnancy and a supplementary unemployment benefit plan (SUB). For the first two weeks of the leave an employee received 93% of their salary. Once the unemployment insurance payments began, an employee is entitled to additional leave with a top-up to 93% of her salary.

The Complainant was denied the short term sick leave benefits because her absence from work was due to a pregnancy related illness. She was denied maternity leave benefits because she delivered on March 10, 1988, six days short of her anniversary of March 16, 1988. Commission counsel pointed out that at the time the *Employment Standards Act* in Ontario required one year and eleven weeks of employment before eligibility for maternity leave. That *Act* has been amended to require thirteen weeks of employment. The Commission took the position that the *Human Rights Code* takes precedent over the *Employment Standards Act* by the doctrine of paramountcy as set out in Section 47(2) of the *Code*. Commission counsel stated that she was not attacking the short term plan itself, simply arguing that the Complainant should have been entitled to benefits under the plan. The application of the plan was discriminatory. An employer may not have an obligation to provide employment benefits but, once it does, it must provide those benefits in a non discriminatory manner.

Commission counsel relied on Supreme Court of Canada's decision in *Susan Brooks v. Canada Safeway Ltd.*, (1989), 10 C.H.R.R. D/6183 (S.C.C.). In that case the Court noted that the maternity benefits under the Unemployment Insurance plan were not an exact substitute for the coverage provided under the Safeway Plan. Under the Unemployment Insurance Commission rules, employees were not entitled to any payment for the first two weeks of their maternity leave. Thereafter they were paid 60% of their eligible income, whereas the Safeway Plan would have provided them with 66 2/3% of their weekly earnings. As well, the eligibility requirements were much more strict under

the Unemployment Insurance plan than the Safeway plan. The Respondent's actions had a similar effect on the Complainant in this case. She was unable to participate in any benefits under the STSP. Although she was subsequently paid retroactively for the period of January to March 10, 1988, those benefits were discontinued on the date of birth. Additionally, since the maternity leave benefits under the Legislative Assembly policies were denied the Complainant, that she receive less under the unemployment insurance plan than she would have from the Respondent's plan.

Commission counsel relied on the *Brooks* case for the proposition that pregnancy is a valid health related reason for absence from the work place. Obviously the Complainant had a valid health related reason for not being at work on March 10 when she delivered her baby girl. No one would suggest that the Complainant was fit to return to work the next day or the day after that. Counsel pointed to Dr. Enkin's report in which he stated that the post-partum period lasts at least six weeks. On the basis of his opinion, the Complainant had a valid health related reason for not being at work for six weeks following the birth of her baby. To hold that sick leave benefits should cease on the day the baby is born is too narrow an interpretation of the benefits that results in an adverse impact on women.

Susan Parcels v. Red Deer General and Auxillary Hospital and Nursery Home (1992), 15 C.H.R.R. D/257 (Alta. Bd. of Inquiry), 17 C.H.R.R. D/167 (Alta. QB.) is an example of how the *Brooks* case has been applied. The *Brooks* case originated in Manitoba and the *Parcel*s case in Alberta. There has been no equivalent case in Ontario. The narrow issue to be decided in the *Parcel*s case was whether the employer discriminated against the complainant by requiring her to pay 100% of her benefits during a maternity leave which were paid by the employer during sick leave. The Board of Inquiry took a broader view of the issue and considered how *Brooks* should be applied in a general way. In the *Brooks* case Chief Justice Dickson said:

> ...the distinction between pregnancy and accidents and illness is an untenable distinction. To maintain the distinction is to eviscerate the purpose of human rights legislation and seriously to disadvantage one group in society...thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women...by sanctioning one of the

> most significant ways in which women have been disadvantaged in our society, would sanction imposing a disportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is the key purpose of anti-discrimination legislation.
>
> ...It would be simply a back handed way of permitting discrimination, increasingly, employee benefit plans have become part of the terms and conditions of employment. Once an employer decides to provide an employee benefit package, exclusion from such schemes may not be made in a discriminatory fashion. Selective compensation of this nature would clearly amount to sex discrimination. Benefits available through employment must be disbursed in a non discriminatory manner
>
> ...combining paid work with motherhood and accommodating the child bearing needs of working women as ever increasing imperatives. Those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant.

Commission counsel took the position that the STSP is clearly disadvantageous to women. Other employees need only work 20 days in order to be eligible for sick leave. A pregnant woman, however, is never eligible. The Legislative Assembly initially denied benefits to the Complainant because they considered her pre-pregnancy condition to be an illness. Being pregnant is a valid health related reason for not being at work and the Complainant should have been eligible for benefits under the STSP before and after her delivery date. There has been recognition by the Supreme Court of Canada that the burden and cost associated with reproduction should not unduly and disproportionately rest on women. Where benefit plans cover absences from work for health related reasons, a pregnant employee must be treated in a nondiscriminatory fashion. Employers cannot rely on a pre-existing rule or policy or provisions of a Collective Agreement that do not distinguish between a health related absence and a non-health related absence as components of a maternity leave. *Brooks* must be taken implicitly to recognize reality: in every maternity leave there is a health related period of absence and, usually, a voluntary period of absence. *Brooks* applies only to the health related component of the maternity leave.

That raises the question of how to define such a health related period. Commission counsel took

the position that if a woman was sick in the early stages of her pregnancy, as in the case of the Complainant, sick leave benefits would apply. As well, there is a presumptive period before and after the delivery. In Brooks, the Court was unwilling to define the number of weeks that would be appropriate but did state that there is definitely a period of time prior to and after the birth that a woman would be prevented from working for valid health related reasons. The Supreme Court did not have evidence before it that would allow it to state definitively what that period should be. In this case, asserted Commission counsel, Dr. Enkins' report does assist us in answering that question. His report was filed without objection from the Respondent and defines his area of expertise as obstetrical and prenatal care. For the last fifteen years his work has been concentrated on the evaluation of practices and procedures carried out during pregnancy and child birth. He was given the details of this particular case and was asked if pregnancy and child birth was a valid health related reason for being absent from work and, if so, how long. His opinion was that pregnancy was not an illness but is accompanied by symptoms of fatigue, nausea, vomiting, backache, fluid retention, vaginal discharge, varicose veins and nerve entrapment syndromes. As pregnancy progresses, the increasing awareness of their bodies intrudes upon women's sense of well being and their ability to concentrate on their work. Pregnancy also includes a number of physiological adjustments affecting a woman's body including marked blood volume increase, stress and strain on joints, particularly in the back and the pelvis and anxiety about forthcoming labour. Those problems are obviously compounded by an abnormal pregnancy such as the one experienced by the Complainant. In those cases additional time off would be required. Dr. Enkin noted the difficulty in determining a single length of time that women should be relieved of the pressures to work during pregnancy but did estimate that six to seven weeks before delivery would suffice for the majority of Canadian women. In the Complainant's case we do know from the medical evidence that she was required to be absent from work from January of 1988. There can be no question in this case about the period of time required to be absent from work before delivery. Dr. Enkin noted that the time after birth is marked by profound physical, hormonal and psychological changes. The metabolic changes that had occurred during the pregnancy are reversed in a matter of days or weeks following delivery. The uterus shrinks back to its pre-pregnancy size and all of the excess tissue is absorbed. It was his

opinion that the traditional six weeks period for a post partum examination is an arbitrary one and it should not be assumed that a woman's body has resumed its pre-pregnant state or is fully functional by six weeks. In his report he notes that historically pregnancy has been defined as the period before birth lasting, on average, 266 days. He preferred the wider meaning of pregnancy which includes the perinatal period. The Supreme Court of Canada in the *Brooks* case, although reluctant to define a period of four weeks pre-delivery and six weeks post-partum as necessary, did recognize the fact that would be the minimum period of time a woman would be entitled to be absent from work. In Dr. Enkin's opinion a cut off point was by nature arbitrary. In his view, the date of delivery was a particularly inappropriate time to cut off benefits. He emphatically rejected the suggestion that a woman would be able to return to work the day after delivery. In his view, six weeks post-partum was inadequate. He defined health as a state of physical, psychological and social well being. The Complainant did not have a normal pregnancy. She had complications almost from the beginning and ultimately had to be hospitalized for a long period of time. All of that according, to Dr. Enkins' report, would have added to the normal stress of a pregnancy. In this case the Complainant had to deal with telephone calls and leaves of absence applications and criticisms about her work. All of that harassment was as a direct result of her pregnancy. Dr. Enkin noted in his report that women who are supported throughout their pregnancy are more likely to have a worry-free labour and be in a state of good health throughout the process. The Complainant was not fortunate enough to have that support. Her work relationships declined during the period: there was no accommodation or understanding for the fact that she could not do a full work load. In addition they criticized her for coming in late and for failing to complete her assignments by deadline. As well, Ms. Schoenberger insisted on the Complainant signing and completing various leaves of absence forms even though she knew that the Complainant objected to the characterization of the leave on those forms. Nevertheless, because the structure of the Legislative Assembly required the leave to be characterized before it could be officially granted, continued to harass the Complainant at a time when she was least able to fight back.

It was the Commission's position that Dr. Enkins' report, the *Brooks* and the *Parcels* decision are

clear. The employer's obligations do not cease on the day of delivery. It is arbitrary to separate the technical state of pregnancy from that of childbirth and post-delivery and the conditions associated with them. These conditions resulting from pregnancy and childbirth, including the post delivery recovery period are gender unique.

Dr. Zaltz's postpartum examination of the Complainant supports that view. His file indicates that on March 16, 1988, six days post delivery, she was complaining of lower abdominal pain, constipation and uterine tenderness compatible with endometritis or a low grade uterine infection. Her next postpartum visit was April 25, 1988, at which time he found her to be improved. He had been provided with a copy of the *Parcels* decision and agreed completely with its view that a postpartum leave of sixteen to eighteen weeks was consistent with mother and infant needs. Specifically, he felt that the Complainant would have been able to return to work sixteen to eighteen weeks post delivery.

The hospital and medical notes are replete with references to the state of anxiety the Complainant was experiencing as a result of a premature birth and the stress she was feeling from her employer over her benefits. She was particularly concerned because, if she had been forced to start her maternity leave in January and delivered on schedule in March, she would have only been entitled to six weeks at home with her new infant. She became concerned she would have to quit her job to care for her baby. That is absolutely contrary to the principles enunciated in *Brooks* as to who should bear the responsibility and cost of child bearing and rearing in our society. All of the pressure was placed on the Complainant.

As the *Parcels* decision and Dr. Enkin's report indicate, the proper meaning of pregnancy goes beyond the date of the birth of the child and includes a pre- and postpartum period. In the Complainant's case her pregnancy leave started in January, ten weeks before her date of delivery. After the date of delivery Dr. Zaltz recommended that the Complainant remain on maternity leave for sixteen or eighteen weeks. That then should have defined the Complainant's pregnancy period. She could have been or should have been away from work with a valid health related reason and eligible

for STSP for that entire period of time. Although, ultimately, the Respondent did pay her sick leave from January 4 to March 10, 1988, they unilaterally and arbitrarily terminated those benefits on the day of delivery. Subsequent to that she was forced to take the lesser benefit under the U.I.C.

The Commission relied on a case from the Manitoba Court of Queen's Bench involving an employment labour relations issue *[Agassiz School Division, No.13 and Agassiz Division Association* (1987), 40 D.L.R. (4th) 715 (Man.Q.B.)] in which a teacher was absent due to the early birth of a child by caesarian section. She applied for sick leave which was refused. The arbitration board granted her grievance and allowed her sick leave. An application to quash that award was dismissed and the court confirmed the Board's statement that an inability to work as a result of the normal delivery and confinement is as much a "sickness" as an ability to work brought on, for example, by a condition of toxaemia during pregnancy. It went on to find that if the grievor was unable to work because of sickness which was the case, she was entitled to sick leave benefits. The Board gave the collective agreement its ordinary and common sense meaning of the word "sick" which was a condition of ill health contrasted to a state of well being.

Commission counsel suggested that the Respondent's argument that the policies of the Legislative Assembly are not necessarily the same as those of the OPS is simply not born out by the evidence. Ms. Schoenberger, in her evidence and in writing, declared that the benefits of the OPS and the benefits of the Legislative Assembly were the same. Ms. Scotland in her evidence said that they were the same. She further went on to say that, if there was any doubt in her mind about the application or interpretation of the Legislative Assembly policies, she would look for advice from Management Board of Cabinet in the OPS. In fact, that is exactly what they did with respect to the sick leave and maternity leave policies. They asked for and relied on Mr. Laberge's opinion in denying those benefits to the Complainant.

Ms. Schoenberger testified that the Legislative Assembly is bound by the same health and benefits policies as the OPS in the absence of establishing their own. The evidence has not shown that the

Legislative Assembly specifically established their own policies but simply adopted those of the OPS. They are therefore bound by those same policies, including the same interpretation and application.

As well, Ms. Mahaney, as senior benefits advisor at Management Board of Cabinet, testified that someone on sick leave for any part of a month would be credited with service for the entire month. The Complainant was retroactively placed on sick leave until March 10, 1988. She should have been credited with service for the entire month of March as a result. The Respondent refused to recognize that service because it took the position that she had to be employed exactly one year by the date of delivery. Commission counsel contended that that was a discriminatory application of the sick leave provisions and the maternity leave provisions that had an adverse impact on the Complainant.

Not only did they apply the policy strictly against the Complainant but they had refused to give her compassionate or discretionary leave or to apply the policy in such a way as to allow her to reach her anniversary date and be eligible for maternity and SUB benefits. Ms. Schoenberger, Mr. DesRosiers and Mr. Edighoffer all stated that they did not want to create a precedent. Their strict application of the rule had an adverse impact on the Complainant, personally, and on women, generally. They could have given her a year of service had they chosen. Ms. Schoenberger suggested that granting the Complainant's request would have created chaos. It was her view that if an exception was made for one person, an exception would have to be made for all others and that, in the final result, there would be no policy. Commission counsel suggested that that is the very antithesis of the accommodation principle. Adverse impact discrimination requires you to make exceptions to existing policies that appear on their face to be neutral. Indeed, an employer is required to make exceptions to those rules to the point of undue hardship. The Respondent was not prepared to do that. Commission counsel contended that this was a classic adverse impact discrimination to which there were no exceptions, no accommodations and no bending of the rules.

Commission counsel stressed that there was no exercise of discretion in this case. The true exercise of discretion requires that there be an absence of bad faith or fraud and a genuine, as opposed to purported, use of discretionary power. That means that the decision maker must personally exercise

the authority conferred upon him or her and not act under the dictation of some other person. As well, the discretion must be exercised in relation to each individual matter and not automatically determined or fettered by reason of a rigid policy. That is exactly what did not happen in this case. Mr. Edighoffer clearly stated that he concurred with, relied on and followed the advice of Mr. DesRosiers. He bound himself to a rigid application of the policy and refused to consider any departure from that policy. Neither he or anyone else put their mind to the individual issues in this case. Mr. DesRosiers could not describe to this Tribunal what factors he took into account in considering the Complainant's request.

Commission counsel also asserted that the Respondent failed to accommodate the Complainant. The Respondent strictly adhered to two policies to the detriment of the Complainant. One policy dictated that the work assigned had to be done on time, regardless of the circumstances. They kept giving the Complainant more and more work and expected her to complete it without any thought to the effect of that workload on her condition. There is absolutely no evidence before this Board that there were any *bona fide* occupational requirements that necessitated a rule that all of the assignments had to be completed within the time frame and manner dictated by the policy. The Respondent could have hired additional help, could have assigned her less work and could have given her more time to complete the work. There is certainly no evidence before this Board that that would have caused any hardship to the Respondent. They had hired someone to replace the Complainant and whatever work needed to be done would have been covered until her return to work, whether that was September, October or January.

Another policy they adhered to strictly was the one requiring a full year of service before eligibility for maternity leave. The evidence is clear that they never put their mind to accommodation. They determined that they did not want to set a precedent and gave no thought to the individual circumstances of the Complainant, notwithstanding the fact that there were several ways they could have accommodated her request without any hardship.

The Commission referred to the "The Duty to Accommodate: A Purposive Approach" [(1992) *1 Can. Labour Law Journal.1*] by David Lepofsky. In that article it was stated as follows:

> "The duty to accommodate has both procedural and substantive elements requiring consideration of the validity of the substantive reasons for the failure to accommodate, as well as a sufficiency of the deliberative and investigative process in response to a request for accommodation."

It went on to say:

> When inquiring into the adequacy of the deliberative process, matters that could have been explored include the following:
>
> 1. Who was involved in the original deliberation and decisions on the accommodation request?
>
> 2. What options for accommodation were considered? Did the employer seek to identify options for accommodation which the worker had not raised? After all, the duty to accommodate goes beyond exploration of the options which workers seeking accommodation, themselves, advance. A Company's superior knowledge of its own business operations leads one to expect that even if the worker has trouble finding options which will work, the Company may well find possibilities worthy of exploration if the matter is given sufficient attention.
>
> 3. Was sufficient effort employed to solicit the views of the worker requesting the accommodation and of those managerial staff who might have ideas on how the problem can constructively be solved.
>
> 4. If proposed accommodations could impinge upon the terms of a Collective Agreement, what efforts were attempted to elicit the Union's view?
>
> 5. If a Company or Union opposed accommodation on the grounds that it might impinge on other legal requirements, whether under a Collective Agreement or otherwise, did these parties take sufficient steps to obtain legal expert advice on these matters? Inquiries could include the obtaining of legal opinions if needed or the soliciting of advice of relevant government and regulatory agencies.
>
> 6. Did the parties who are under a duty to accommodate make an effort to find out how other organizations have dealt with similar accommodation requests and what impact such accommodations have had on the workplace?

A meeting was held with Cynthia Smith and with Dr. Gardner about the Complainant's performance. Although she told them that she was experiencing a high-risk pregnancy, there is no documentation that they made any efforts at the time to accommodate her. Because of her concerns about the VDT terminals, she continued to write out her assignments by hand. She was not given extra secretarial support and, in fact, complaints from the secretaries became part of Dr. Gardner's criticisms. They approached her high-risk pregnancy with irritation and criticism.

With respect to accommodation on extending the time for her return to work, Mr. DesRosiers frankly acknowledged that he could not remember what factors he took into consideration in deciding to deny the request. He said all he considered was the fact that there was work to be done. There is an absence of any evidence that he considered alternative methods of producing that work or accommodating the Complainant. His attitude towards the Complainant's difficulty in finding proper daycare were impressionistic at best. His evidence was that he knew that there were "babysitters out there." In contrast, Ms. Beach's evidence was very accurate and relevant. There can be no doubt, based on her own experience, that finding proper day care is very difficult, especially with unreasonable time constraints. While the Clerk did extend the time limits for the Complainant's return to work, the evidence is clear that those extensions were done on an arbitrary basis. They were not based on a sound reasoning but rather were a reaction at the time to each request as it was made. It was his sense that a two-week extension was equitable for reasons that he could not explain.

The Commission took the position that the Complainant had been discriminated against on the basis of family status, which is defined as "the status of being in a parent and child relationship." If the Complainant had not had a child she would not have needed daycare and which put her in the position of requiring accommodation. Ms. Beach's evidence was clear and extensive; finding adequate daycare for women has always been and continues to be difficult. The Complainant gave the Board a detailed account of the attempts she made to secure day care for her children. The Respondent has suggested that the Complainant was unreasonable in her desire for a licensed day care facility and negligent in securing alternative day care until that was available. The fact is that the Complainant made every effort to secure day care. She placed her infant on the list for day care at Queen's Park

in September of 1987. That opportunity did not present itself until October of 1988. She also attempted to reserve places at other day care centres, without success. She was prepared to accept unlicensed day care from a neighbour until one of the day care centres spots opened up but even that was unavailable until October. The Respondent has not presented any evidence to show that it would have been a hardship for it to allow the Complainant to wait to return to work until she had acceptable day care arrangements in place. To the extent that the Respondent has suggested that the Complainant was unreasonable in her day care inquiries, the Commission suggested that the evidence shows the contrary; that is, that the Respondent was unreasonable in expecting more. The Complainant never abandoned her position. She made it clear consistently that as soon as she was able to obtain the proper, safe day care she would report for work.

The Respondent also has argued that the Complainant cannot return to work because of her political activity. First, any affiliation she had with a political party was in the past and it was not in the province of Ontario. She never mislead the Respondent when she was hired but answered truthfully. Secondly, although letters were written on her behalf and by her to various politicians, this was not done in a partisan manner and covered all three political parties. She wrote to whomever she felt could assist her in her fight for sick leave and maternity leave. The position of the Legislative Assembly concerning political activity is found in *Bill 117 , An Act to revise the Crown Employees Collective Bargaining Act and to amend the Public Service Act and Labour Relations Act* and states as follows:

> "As the Office of the Assembly provides services to all political parties of the Legislature, it is important that employees be and are perceived to be non partisan in order to have the trust of all members. Employees of the Office of the Assembly are prohibited from certain political activities. Political activity is defined in the Legislative Assembly Act as follows:
>
> a) for the purposes of this part, a Crown Employee engages in political activity when he or she does anything in support of or in opposition to a federal or provincial political party;
>
> b) does anything in support of or in opposition to a candidate in a federal, provincial or municipal election and;

c) comments publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the position or policies of a federal or provincial political party or in the positions publicly expressed by a candidate in a federal or provincial election

The Complainant was simply trying to exercise her rights to benefits that she believed she was entitled to and had been improperly denied her. Her method of doing that was to contact whomever she felt could assist her in her fight. None of those contacts were made for political reasons.

The Commission took the position that the Respondent cannot defend its actions by arguing that its policies were consistent with or better than the provisions of the *Employment Standards Act*. That *Act* establishes minimum conditions of employment but the *Human Rights Code,* as a quasi-constitutional statute has paramountcy over that Act. The Commission referred to Tanys Quesnel v. London Educational Health Centre, (unreported) Ont. Bd. of Inquiry, 28 March 1995 (John), in which the Respondent attempted to rely on the fact that he had complied with the building code in arguing that he did not have to build a ramp for access for handicapped people. In that case the building code was seen as a minimum standard and even, though the building code did not require the Respondent to build a ramp, he could not rely on that as a defence. The *Code* prohibited discrimination on the grounds of handicap and to deny access to people in wheelchairs was contrary to its terms.

The Commission relied on the following cases: *Middleton v. 491465 Ontario Ltd.* (1991), 15 C.H.R.R. D/317 (Ont. Bd. of Inq.); *Holloway v. MacDonald* (1983), 4 C.H.R.R. D/1454 (B.C.H.R.C.); *Magnusson v. Merlon Management Ltd.* (1986), 8 C.H.R.R. D/3641 (Sask. Bd. of Inq.); *Stefanyshyn v. 4 Seasons Management Ltd.* (1986), 8 C.H.R.R. D/3934 (B.C.H.R.C.); *Riggio v. Sheppard Coiffures Ltd.* (1987), 9 C.H.R.R. D/4520 (Ont. Bd. of Inq.); *Brown v. Robinson*(1989), 10 C.H.R.R. D/6286 (B.C.H.R.C.); *Hurd v. Cho* (1990), 12 C.H.R.R. D/247 (B.C.H.R.C.); *Magee v. Warner Lambert Canada Inc.* (1991), 12 C.H.R.R. D/208 (B.C.H.R.C.); *Heincke v. Brownell* (1990), 14 C.H.R.R. D/68 (Ont. Bd. of Inq.); *Re Emrick Plastics v. Ontario Human Rights Commission (*1992), 90 D.L.R. (4th) 476 (Ont. Ct. Gen. Div.); *Nguyen v. Pacific Building*

Maintenance Ltd. (1991), 15 C.H.R.R. D/472 (Sask. Bd. of Inq.); *Jenner v. Pointe West Development Corp.* (unreported) Ont. Bd. of Inq. (5 April 1993) (Tomaszewski); *Lynn Gosselin v. Kenora Ballet School, Gerda Vidovic and Angie Wrighton* (unreported) Ont. Bd. of Inq. 28, February 1994 (Mikus); *Brooks, Supra; Parcels, Agassiz School Division, Supra; Alberta Human Rights Commission v. Central Alberta Dairy Pool* [1990] 2 S.C.R. 489; *Renaud v. Central Okanagan School District No. 23* [1992] 2 S.C.R. 970; *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143; *Anthony Wong v. Ottawa Board of Education and Alan Wotherspoon* (unreported) Ont. Bd. of Inq. (Hubbard), (9 August 1994); *Chambly, commission scolaire regionale v. Bergevin* (1994), 115 D.L.R. (4th) 609 (S.C.C.); *Tanys Quesnel v. London Educational Health Centre, Supra;* (John), (28 March 1995); *OPSEU (Walker) v. Ministry of Correctional Services* (January 3, 1990) unreported, Grievance Settlement Board (Fisher); *OPSEU (Carvalho) v. Ministry of the Attorney General, (*April 6, 1989*)* (unreported) Grievance Settlement Board; *(*Kirkwood) *OPSEU (Stacey) v. Ministry of Correctional Services*, (April 9, 1985) (unreported) Grievance Settlement Board (*Roberts*); *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 S.C.R. 145; *Nishimura v. Ontario Human Rights Commission* (1990) 11 C.H.R.R. D/246 (Ont. Div. Ct.); *Re Winnipeg School District No. 1 v. Craton et al.* (1985), 21 D.L.R. (4th) 1 (S.C.C.); *Carol Shaw v. Levac Supply Ltd. et al.* (1991), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.); *Ghosh v. Domglas Inc. et al.* (1992), 17 C.H.R.R. D/216 (Ont. Bd. of Inq.); *Nisbett v. Manitoba Human Rights Commission* (1992), 18 C.H.R.R. D/500 (Man. Q.B.) (1993), 18 C.H.R.R. D/504 (Man. C.A.); *Ford Motor Company of Canada et al. v. Ontario Human Rights Commission et al.* (unreported), Ont. Div. Ct. (January 13, 1995); *Mike Naraine v. Ford Motor Company of Canada Ltd. et al.* (unreported) Ont. Bd. of Inq. (Backhouse), April 21, 1994; *Espinoza v. Coldmatic Refrigeration of Canada Inc. et al.* (March 31, 1995) (unreported) Ont. Bd. of Inq. (Hartman); *OPSEU (O'Brien) v. Ministry of Correctional Services* (June 26, 1987), unreported (Ganz) Grievance Settlement Board; *OPSEU (Jackson)v. Ministry of Correctional Services* (April 19, 1984), unreported (Roberts) Grievance Settlement Board; *OPSEU (Kuyntjes) v. Ministry of Transportation and Communications* (April 9, 1985) (unreported) (Verity) Grievance Settlement Board. As well, it referred to the following: Ontario Human Rights Commission, Guidelines for Assessing Accommodation Requirements for Persons with Disabilities (1989); David Lepofsky, The Duty to Accommodate: A

Purposive Approach, Supra; Sandy Price, "Accommodating Women in Employment: The Limitations of a Traditional Approach" (1992) 1 Can. Labour Law Journal 140; *Julie Lord v. Haldiman-Norfolk Police Services Board and Chief Lee Stewart* (June 14, 1995) (unreported) Ont. Bd. of Inq. (Mikus): *Alan Shreve v. Corporation of City of Windsor and Jerry Hancock and Ontario Human Rights Commission* (May 25, 1993) (unreported), Ont. Bd. of Inq. (Kerr); *Ont. Human Rights Commission and Brad Thomson v. Fleetwood Ambulance Service* (November 10, 1995) (unreported), Ont. Bd. of Inq. (Laird); *Gary Thornton* v. *North American Life Assurance Company and Clarendon Foundation* (October 16, 1991) (unreported), Ont. Bd. of Inq. (Plaut); *Ontario Human Rights Commission and Gaines Pet Foods Corp. Et al* (1993), 16 O.R. (3d) 290 (Div. Ct.); *Folch v. Canadian Airlines International* (May 29, 1992) (unreported), Canadian Human Rights Tribunal (Block and Samji); *Belleville General Hospital and Service Employees Union, Local 183* (1993), 37 L.A.C. (4th) 375 (Thorne): *Ontario Human Rights Commission v. Zurich Insurance Company and Michael Bates* (1992) 16 C.H.R.R. 29; *York Condominium No. 216 v. Dudnik* (1991), 14 C.H.R.R. 45.

SUBMISSIONS FOR THE RESPONDENT

Respondent's counsel took the position that it is the Manual of Administration at the Legislative Assembly that governs this case. Whatever policies or application of those policies existed within the OPS is irrelevant. The Manual of Administration, it was submitted, is the culmination of the decision by the Legislative Assembly and the Speaker to enact their own benefits. It is the Manual of Administration that excludes the Office of the Legislative Assembly under Section 92 of the *Legislative Assembly Act* from by the OPS policies. The Manual of Administration indicates that they have created their own benefit provisions, which may or may not be the same and may or may not be applied in the same manner as OPS policies. Maternity leave is included in that Manual of administration. After one year of service, employees were eligible for paid maternity benefits. Before the completion of that one year, they were eligible for maternity leave without pay. An employee could choose to start maternity leave within the eleven weeks preceding the date of delivery. Irrespective of when the maternity leave began, an employee was entitled to six weeks following the delivery date. Those provisions were, in essence, the same as those provided for under the

no entitlement to STSP benefits or paid maternity leave. Outside of that seventeen week period, a pregnant employee who was ill and could not perform the duties of her position was eligible for STSP benefits unless she was staying at home as a preventative measure. The policies also provided for a various discretionary leaves with qualifiers for each.

The claim that the Complainant was harassed was added to this complaint at the hearing. The Complainant has made very serious allegations about the motives of Dr. Gardner, Ms. Smith and Ms. Schoenberger. The Respondent acknowledged that the Complainant was under a great deal of stress during this time but suggested that her perception of events was very much affected by that stress. Much of what the Complainant saw as harassment was viewed through her particular "filter". Ms. Smith and Dr. Gardner did their best to help the Complainant through this period, even though she never actually asked for any assistance. Although she told this Board that she did not believe she needed any accommodation, the fact is that she wanted Ms. Smith and Dr. Gardner to divine from the circumstances that she should be given assistance in any event. They were advised that the Complainant was experiencing a high-risk pregnancy. The problem was what they were to do with that information. The Complainant's position was that she did not need any accommodation and that everything was fine. Even at that stage the Complainant refused to accept any suggestion that there could be anything wrong with her work or her pregnancy. She was obviously of the view that her high-risk pregnancy should shelter her from any criticisms about her work whether warranted or not. Much evidence was given about the work assigned to the Complainant during this period of time. Ms. Smith's and Dr. Gardner's evidence was clear, however, that these were not major assignments and required a minimal amount of independent research She had worked on many of the issues in the past and was simply updating the data. Ms. Smith was determined not to give the Complainant any more significant assignments and attempted to follow those guidelines for as long as the Complainant was at work. There was some confusion in that both Dr. Gardner and Ms. Smith were assigning work at the same time but there is no evidence to show that between the two of them the Complainant was given too much work or even as much work as she had been given previously, notwithstanding the number of projects assigned to her.

Many of the other allegations about harassment arise after the Respondent discovered that the Complainant was suffering from a high-risk pregnancy. In fact, the first one appears to be a dispute over when the Respondent were first made aware of that fact. The Complainant says that she told them on September 15, 1987: Ms. Smith said it was late October. It was agreed that there was some discussion about difficult pregnancies in September but Ms. Smith maintains that the words high-risk pregnancy were not used at the time and, had they been, she would have noted them. There was another discussion in late September after Dr. Gardner returned from vacation. The Complainant was unable to be positive about whether or not she discussed her high-risk pregnancy with him at that time. In cross-examination of the Complainant it became clear that she made assumptions that other people knew things without having been told and this is one of those examples. It was Respondent counsel's submission that the objective tests support a finding that Ms. Smith was not advised as to the high-risk pregnancy until late October because, it was at that point, that medical documentation was requested. A doctor's note dated November 5, 1987 was provided in response to that request. That is consistent with a person who knows for the first time that there is a high-risk pregnancy involved.

What is equally clear, at this time, is the single-minded, stubborn, and, even rigid, attitude of the Complainant. Very early on in her pregnancy she had determined that she was going to achieve a paid leave of absence and a further six-month maternity leave. As it became clearer to her that her plan might be in jeopardy, she acted with a set goal in mind and which was to get a paid maternity leave. That that became her sole focus and anything that might have adversely affected that plan she either ignored or reconstructed. She steadfastly maintained her original plan and never considered an alternative. She admitted that her mind was on a "particular trajectory" and that her way of thinking never changed from July of 1987 until August 23, 1988. An example of that is when she refused to acknowledge that she had anything to do with contacting David Cook because it was her agent, Terry Moore, who actually sent the letter. When it was suggested to her that the letter was sent with her knowledge and consent and, therefore, she did have a part in sending it, she refused to accept responsibility. She was asked by Respondent's' counsel whether this was an example of being oblivious to the possibility that others might view the event differently. She conceded that that might be the case. That attitude was prevalent throughout her evidence. Another example is the matter of

her arriving late at work every day. Because it upset her, she believed Ms. Smith was wrong to criticise her at the time. She acknowledged, however, without question, that she was late every day because she had to drop her son off at his school. She never asked whether she could have some flexibility in her hours and never explained why she was late until she was asked. Nevertheless, Ms. Smith was wrong for having raised it when she did.

Another telling example is the offence the Complainant took to a conversation over her weight and maternity clothes. She found Ms. Smith's casual comments to be upsetting and hurtful. Ms. Smith made an innocent remark that the Complainant took in the most negative fashion. She interpreted Ms. Smith's remarks as being insincere, based on something she was told by another employee. She never confronted Ms. Smith about the alleged remark, simply took offence at it.

Similarly, she felt that the criticisms about her work were unfounded and unfair. When it was pointed out to her that the secretaries found her work disorganized, confusing and found her difficult to work with, she suggested that it was the secretary's fault and not hers. Again she refused to accept her own responsibility over any of these matters and attributed all of her problems to someone else. The Complainant similarly took extreme offence to the fact that Ms. Smith had emptied her office of her personal belongings and asked her to pick them up. The Complainant refused to acknowledge the fact that Ms. Smith had been informed that the Complainant would not be returning to work until after the birth of her baby, which would have been some time in March. Assuming that maternity leave would follow that delivery, the Complainant was not going to be returning to her desk for some period of time. A replacement had been hired and was going to need to work at the Complainant's desk. It was reasonable in the circumstances for Ms. Smith to empty out the Complainant's desk and to ask her to pick up her belongings rather than risk having them stolen and/or lost in the interval. The Complainant, however, took that to be another sign of Ms. Smith's insincerity and callousness.

She also viewed all of the contacts at the hospital by Ms. Scotland and Ms. Schoenberger as harassment. A look at her calendar for that time indicates that there was a tremendous amount of activity in her life from January through until the end of August. As well as the conversations with

Ms. Scotland, her diary shows that she had several visitors while she was a patient as well as numerous telephone conversations. On one day in particular she had five visitors, on another, six. It was not the number of contacts made but the nature of the contact that was upsetting to the Complainant. Her employer was requesting that she fill out forms for unpaid maternity leave while her plan required not only paid maternity leave but SUB benefits during that leave and a subsequent extension to that leave. Interestingly, while the Complainant objected to the telephone calls from Ms. Scotland and Ms. Schoenberger, she expressed some resentment over the fact that neither Dr. Gardner nor Ms. Smith visited her while she was in the hospital. Respondent's' counsel also pointed out that at no time did the Complainant ever specifically tell Ms. Scotland or Ms. Schoenberger not to call because they upset her.

Another example of the particular "filter" that the Complainant used to view events is the card that Ms. Smith gave to her in the hospital. The Complainant suggested that the card had a message in it that was a sign of Ms. Smith's insincerity. The card is, at worst, innocuous, and, at best, a thoughtful gesture. The Complainant was not prepared to give Ms. Smith any credit for her gesture.

The Complainant even viewed the red ink used by Ms. Schoenberger on the Request for Leave form as additional pressure. She would not accept the suggestion that someone was simply trying to highlight the forms so she would see what had been done and what needed to be done. She saw the Respondent's' persistence in wanting the form signed as harassment but never saw her own persistent refusal to sign the forms as negative. In particular, the Complainant determined that Ms. Schoenberger had acted in a fraudulent manner by changing the Request for Leave form after the grievor had signed it. It was not until the hearing that the grievor even noticed that she had, in fact, done exactly the same thing. Ms. Schoenberger had signed the first form as "approved" which the Complainant subsequently changed. The one significant difference between their actions was that Ms. Schoenberger highlighted hers so that the grievor would note the changes. The Complainant was not as thoughtful. When it was pointed out to her at the hearing she said "maybe I've looked at it the wrong way."

The refusal to pay the STSP benefits was, in the Complainant's view, evidence of harassment. Respondent's' counsel suggested that it was simply evidence of a disagreement about how the leave should be characterised and whether or not it should be paid. It was, in his submission, a legitimate difference of opinion and not harassment. The Complainant was absolutely convinced that she was entitled to STSP benefits and therefore saw any denial of those benefits as harassment. She refused to acknowledge that there might be reason for the difference of opinion. Respondent's' counsel suggested that the personal characteristics portrayed by the Complainant were identified by Dr. Januszewska as typical of an obsessional personality. Those characteristics had a part in the Complainant's perception of what was done to her by others and for what motives.

The Complainant also was in some ways less than truthful with the Board because of her single-minded attitude. For example, she was asked whether she had contacted a member of Parliament and responded "no." In fact, she had contacted David Cook but maintained that Mr. Moore contacted Mr. Cook, not her. She answered in a technically correct manner which was, nevertheless, misleading. Mr. Moore acted as her agent, and, as such, she knew and condoned his decision to contact Mr. Cook. In effect she contacted Mr. Cook, notwithstanding her denials.

The Complainant also misunderstood what she was told by Ms. Scotland about her anniversary date. Ms. Scotland told her that women did take vacation, MCO days and other leaves to delay the onset of their maternity leave, usually with the intention of having a longer period of time off after the birth. Ms. Scotland never told her she could use her vacation or MCO days to bridge a gap to her anniversary date. Ms. Scotland has had extensive experience in dealing with the administration of benefits and is very clear on how they are to be applied. She would not have suggested an arrangement that she knew was not permissible.

The Complainant felt that she was being harassed because she was placed on maternity leave on January 4, 1988 when she was admitted to hospital. The Respondent's' counsel asked the Board to remember that the policy allowed the Respondent to place a pregnant employee on maternity leave if she was unable to perform her duties. The Respondent had been advised that she would not be

returning to work for quite some time and acted reasonably in placing her on maternity leave. While she was on maternity leave she was not eligible for STSP benefits.

Section 25(2) of the *Code* is a statutory defence that allows for discrimination on the basis of sex with respect to the provision of certain benefits during the period of a maternity leave specified in the *Employment Standards Act*. It is an exception that is allowed under the *Code*. The Complainant did not want to be placed on maternity leave because it precluded her from being eligible for STSP benefits. Instead of placing her on maternity leave, Ms. Schoenberger suggested that she have a discretionary leave without pay from January 4, 1988 to the birth of the baby. The effect of the discretionary leave without pay would have been to allow the Complainant to postpone her maternity leave to the date of birth. If she was fortunate and the date of birth post-dated her anniversary date, she would have been eligible for paid maternity leave. Ms. Schoenberger's decision helped the Complainant: it did not have a negative impact on her. During a discretionary leave, the Complainant was not eligible for STSP payments. The Laberge opinion was done on the assumption that she was not on maternity leave and was within that seventeen-week window. Because the Complainant had been admitted into the hospital as a preventative measure, she was denied eligibility for STSP benefits. There was no bad faith associated with that decision. It was simply an interpretation of a benefit plan that was valid at the time. The Commission relied heavily on the Graham Stoodley decision that sick leave benefits should be paid. However, within the context of this case, it is explainable. The issue in the second opinion was whether this was a pregnancy- related illness. Consideration was given to arbitration awards that had addressed that question and ultimately the decision was made that she should be compensated. Rather than a strict interpretation of the policy, the focus of the second opinion was whether or not the griever's condition was pregnancy related.

The evidence during this time is consistent with the Complainant's objective of obtaining seventeen weeks of paid maternity leave and the six-month extension. Respondent's' counsel suggested that the Complainant's assertion that she did not understand her leave was to expire seventeen weeks after March 10, 1998 is another example of the filter she used to process events. It shows wilful blindness to reality.

At the hearing the Complainant seized upon the words "as required" on the leave form to justify her belief that she could take whatever leave she felt was required. Notwithstanding the fact that she was aware from the onset that her leave would be limited to that provided under the *Employment Standards Act*, she continued to act as if it were entirely up to her to determine the length of her leave. That shows a total disregard for reality but is consistent with her attitude throughout this time.

Ms. Morgan confirmed the Respondent's' submissions regarding the filter referred to earlier. In her evidence Ms. Thompson said that the Complainant was attempting to keep everything under control using strategies consistent with her personality. The Complainant was at the point where she was managing to keep everything under control, but just barely. Anything that added to her burden she viewed as being harassment, for ulterior motives known only to herself.

In fact, submitted Respondent's' counsel, the whole issue of family status is a creation designed to get the Complainant what she wanted through another route. She did not get paid maternity leave, therefore, was not eligible for an additional six months leave. When she was told to return to work she did not want to and subsequently took the position that she had been discriminated against because she was not allowed to stay home until her child care arrangements were in place. The Commission pointed to Ms. Beach's evidence as proof that the problems the Complainant encountered were legitimate. However, Ms. Beach agreed in cross-examination that a prudent person would have planned for some contingencies, especially knowing the entitlement to a six month extension was not available.

The Respondent did not take issue with the choice of child care preferred by the Complainant. However, it does contend that that is a matter of personal choice, not of family status. If the Complainant chose to restrict her search for child care to 5% of available spots in the province, that is her choice. Implicit in that choice, however, is the fact that there might be difficulties getting what you want and it was her responsibility to ensure that she had made alternative arrangements in the event she was unsuccessful in her first choice. Ms. Beach's evidence was clear, the vast majority of daycare spaces are unregulated. Anyone who wants to restrict their choices to those regulated spots

must take particular care to make ensure that those spots are available when needed. The Complainant knew that she was only being granted maternity leave for seventeen weeks from the date of birth, which was March 10, 1988. She claims to have been surprised when she was notified that she was to return to work in July of 1988. If she was surprised it was because she wilfully ignored the facts. While she did take steps to make child care arrangements at the onset of her pregnancy, she made no effort to revise those plans once it became clear that she was not going to be entitled to as much time off as she had hoped. She made no efforts to make alternative child care arrangements until she was notified in July to return to work. Her diary is very instructive in this regard. She has kept meticulous records in her diary throughout this whole process of events as they occurred and yet, from July 5, 1988 when she received the letter from the Clerk advising her that she was to return on July 18, 1988, until August 23, 1988 there is no reference in the diary to inquiries about child care. There are occasions where there are letters sent to people explaining why she could not obtain daycare, but there is nothing in the diary to suggest that she made any contact with anybody directly. There is, however, a notation on July 11, 1988 that she was making arrangements to rent a cottage for a vacation. On July 27, 1988, she paid for that cottage and spent a week of vacation there in August. Respondent's' counsel submitted that that was not reasonable behaviour for someone who has been advised that they are to return to work. By that time a reasonable person would have made much greater efforts to be able to return to work, which would have included much more strenuous efforts to find daycare. In an effort to assist, she was given an extension to August 2, 1988, which was four weeks beyond her seventeen-week leave. Sixteen days later she wrote to the Clerk advising him that she needed until October 10, 1988. That letter does not indicate what efforts she has made, if any, to obtain daycare. It simply requests an extension. The Clerk, in fact, does give her an extension until August 9, 1988, five weeks past the expiry of her leave. Instead of appearing for work on August 9, 1988, she dropped off a letter, again saying that she needed more time but not explaining what she had done in the meantime to deal with the situation. The termination was processed but, after discussions with Mr. Moore and Mr. Cook, she was given one final extension to August 24, 1988. She suggested that the Clerk was being unreasonable in only giving her a two-week extension, forgetting entirely that she was out of town at a cottage for a week of that time. It was submitted that those are not the actions of a reasonable person. It was not unreasonable of the

Clerk to expect that she would stay in Toronto and continue to look for daycare, rather than spend a week at a cottage. Respondent's' counsel reminded the Board that the griever was on probation at the time. She was not a person with a long record of service.

The Commission's submission that there was no need for the Complainant to return because her work was being adequately covered during her absence simply ignores the facts. The unequivocal evidence of Ms. Smith and Dr. Gardner was that it was a busy time and getting busier. There were constitutional hearings and increased committee activity and projects from individual numbers were increasing in number. Unlike 1987, 1988 was not an election year and there was no decrease in the volume of work over the summer. In fact, there was a shortage of staff. Two people resigned and one person went on maternity leave. In addition, people were away for vacation. Yes, Ms. Drummond had been hired to replace the Complainant. Nevertheless, she was over worked. The need for social policy issues was building and Dr. Gardner was pressed to do some of the work that the Complainant would have done had she been there. The research service consists of 15 or 16 employees at full complement. During the time that the Complainant was off, two experienced researchers quit and one was on maternity leave. The Complainant was the fourth experienced staff person unavailable to do the work.

Respondent's' counsel submitted that the suggestion that the Complainant began work on March 9, 1987 rather than March 16, 1987 is not supported by the evidence. The Complainant has maintained throughout this process, until just before the hearing, that her start date was March 16, 1987. She did attend orientation on March 9, but she was not paid for the day. It has never been accepted as her start date by her or anyone else.

With respect to the denial of sick leave benefits, Respondent's' counsel submitted that the Commission's theory that there should be some award of general damages above and beyond the breach of the *Code* is moot. There would be no purpose in dealing with a matter which ultimately was resolved in favour of the Complainant. No damages can arise under the *Code* for a failure to provided the benefits sooner rather than later. The Respondent reminded the Tribunal that even on

the Commission's theory of the case, it was only in hindsight that the decision to deny STSP could be considered unlawful. At the time, *Bliss v. Attorney-General of Canada (1978), 92 D.L.R. (3d)417 (S.C.C.)* was the law of the land. According to *Bliss*, there would have been nothing objectionable about the short term sickness plan. Obviously *Brooks* changed the law but it would be completely inconsistent with the purpose of the *Code* to penalize a Respondent for having made decisions that were, at the time, lawful and which, only in retrospect and in the light of subsequence Supreme Court of Canada decisions might now be said to be unlawful. There would be no policy purpose served by awarding general damages against the Legislative Assembly for a decision to pay STSP in April rather than in January. That would inhibit employers from making changes for fear those changes would be taken as an admission of liability.

In any event, section 24(2) of the *Code* is a statutory defence to discrimination upon the basis of sex. It has been established in Ontario that a self-insured benefit provided by a Provincial Government which discriminated upon a prohibited ground of discrimination was within the protection of that subsection even if the administration of the benefit was undertaken by an insurance company through an Administrative Service Only (ASO) contract with the Government. The denial of STSP benefits from January 4 to March 10, 1988 was initially saved by Section 24(2), (now Section 25(2)) of the *Code.*

Finally, a employee who misrepresents or lies in order to secure employment to which they would not have otherwise have received will not be entitled to a remedy from this Board.

It was Respondent's' submission, in any event, that this Board does not have the jurisdiction to deal with an issue that is unrelated to discrimination. The question of when the appropriate start date was placed before the Speaker as part of the grievance procedure. It was unrelated to any claims of discrimination and dealt solely with the issue of her start date. Once the Speaker had rendered a decision on that issue it was then final and binding. This Board has no jurisdiction to overrule the Speaker in that regard.

Respondent's' counsel also submitted that the denial of paid maternity leave was not discrimination on the basis of sex but rather than on the basis of lack of service. It reminded the Board that pregnancy leave was available to all employees of the Legislative Assembly, irrespective of their length of service. Paid maternity leave, however, was an entirely different matter. Only women who had at least one year of seniority and/or service were eligible for paid benefits. It was clearly meant to be a threshold. You either do or do not have a year of service by the date of delivery. If you do not, then you are not entitled to the benefits. You cannot create service that does not exist. The rationale for the threshold is that employers should not be put to the burden of having to do without the services of someone it hired unless that person has at least given some commitment to that employment relationship.

The Complainant's assertion that she does not take issue with the *Employment Standards Act* is inconsistent with its assertion that the Respondent cannot rely on compliance with the Act as a defence. The Commission has argued that compliance with the *Employment Standards Act* does not necessarily mean compliance with the *Code* and relies on the *Quesnel, Supra* case for that proposition. There was, however, an important distinction between that case and the one before this Tribunal. The building code in the *Quesnel* case was silent on the issue of ramps, therefore, there was no inconsistency between it and the *Code*. There was, therefore, no analysis as to whether or not the building code was inconsistent with the *Code*. If the building code had dictated that a ramp had to be built according to certain specifications, it would have been appropriate for the Respondent to rely on it as a defence. In that case, however, it did not need to. In this case, the *Employment Standards Act* does provide a threshold requirement for service before eligibility for maternity leave. That is the very issue the Commission claims is discriminatory in the Respondent's policy. The short answer to that claim, contended the Respondent, was that there is no prohibited ground of discrimination relating to service. If this Board should determine that the Legislative Assembly's policies respecting maternity leave are discriminatory and contrary to the *Code*, it must come to the conclusion that the *Employment Standards Act* violates the *Code* as well.

The Commission points to the fact that the *Employment Standards Act* now has a reduced requirement of only thirteen weeks of service as an indication that the longer term was unreasonable

or improper. That, again, is inconsistent with its position because, if the Commission is right, there can be no threshold.

The Commission took the position that discretion should have been exercised in relieving against a strict application of the Respondent's rules. The theory of their argument seems to be that the Legislative Assembly was bound to exercise discretion in the Complainant's favour. The first answer to that claim is that, if it is not unlawful to insist upon a service threshold, it cannot be unlawful to refuse to relieve against it. The more analytical answer, however, is that the rule does not contemplate the exercise of discretion. The Complainant, therefore, had no entitlement to the exercise of discretion. Her entitlement was to the rule. The Complainant relied on the *Carvallo, Supra,* case. In that situation there was a rule and the entitlement under the collective agreement was not just to the rule but also to the exercise of discretion as to whether apply the rule strictly. The employer created a rule which obviated the need for discretion. That case stands for the proposition that, where a party has been invested with the power to exercise discretion, it cannot constrain itself by promulgating a strict rule. The reverse is also true. If entitlement is the rule, there is no obligation on the Legislative Assembly to exercise discretion to relieve against it.

It was said by the Respondent that there are also logical problems associated with the Commission's suggestion that the Respondent ought to have exercised its discretion. The essence of discretion is that one is not bound by rules that eliminate independent judgment. The Commission in this case would have the rule concerning maternity leave replaced by a rule that everyone is entitled to the maternity leave benefits irrespective of their service. There is no basis in logic or practice to differentiate one case from the other once you decide that the rule is no longer applicable.

The Respondent also contended that ,even if the exercise of discretion were relevant in this case, the insistence of the Respondent upon not establishing a precedent was not based on a prohibitive ground of discrimination. The Respondent refused to exercise their discretion to create a precedent. It did so out of concern for the future. There are no grounds upon which the Commission can claim discrimination in arriving at that decision. It is not a matter of gender or family status or sex. It is simply based on a practical consideration of the future effect of a decision.

The Commission has suggested that the Respondent act in a discriminating manner by refusing to allow the Complainant maternity leave, despite the fact that they had done so for employees in the OPS. The fact is that there is evidence before this Board of one other person who was allowed to bridge a gap between her delivery date and her anniversary date. The reasons for that bridging are not before the Board and that one incident can hardly be considered a practice in the OPS. All of the people involved in deciding not to exercise their discretion in favour of the Complainant testified that they had a valid reason to be concerned about setting a precedent that would have the effect of cancelling the rule.

In order for the rule that an employee must have a year of service before she is entitled to paid maternity leave to constitute adverse effect discrimination it must have a disparate effect on a group identified by a prohibited ground of discrimination. There is no such prohibited ground in this case. The basis of distinction is service. Therefore there can be no adverse effect.

The Commission has also argued that a failure to exercise discretion is the antithesis of accommodation. In the first instance, there has not been any discrimination on a prohibited ground that makes accommodation a consideration. Secondly, and more importantly, a decision that is truly discretionary can not be adverse effect discrimination for the simple reason that adverse effect discrimination relies upon the existence of a rule. The exercise of discretion is the antithesis of that rule. If one is truly exercising discretion, adverse effect discrimination can not apply.

The Respondent took issue with the Commission's argument that the denial of the paid maternity leave was discriminatory because it was subject to a one year qualifying period whereas the STSP only had a twenty-day service requirement. They served two different purposes. One dealt with entitlement to paid leave for a seventeen paid week period. The other was for an indefinite period. It is by no means certain that sick leave will be used, by how many and for how long. The nature of the leave is such that in most cases one expects or hopes that it will be of short duration, if it is necessary at all. The fact that there is a lesser service requirement for one is reflective of the commitment required by an Employer in fulfilling its obligations under these two provisions. The

other critical fact about these two benefits is that they are mutually exclusive and that is not only with respect to pregnant women. An employee on maternity leave, on a leave without pay to visit a friend in Vancouver, or on a leave with or without pay to attend school is not entitled to STSP benefits. The reason is obvious. STSP benefits are an indemnification for people who would not be able to attend at work. If you have already removed yourself from the workplace, there is no need for such an indemnity. The Complainant was not in a special group under the *Code* because she was on a leave of absence. Everyone who was on a leave of absence was excluded for the same reason.

The Commission relied heavily on its argument that the OPS policies should have been applied in the Legislative Assembly. The OPS policies are not relevant as policies. No practice within the OPS is relevant and no practice within the OPS is binding on the Legislative Assembly. They are different employers at law. The Legislative Assembly is not bound by the *Public Service Act* and its employees do not meet any of the definitions in the that *Act*. The *Legislative Assembly Act* establishes the Speakers powers, subject to the approval of the Board of Internal Economy, to create policies. In the absence of those policies, the OPS policies are deemed to apply to the Legislative Assembly. The fact that the same written policies may or may not apply does not mean that the practice with respect to those policies must be consistent. The Legislative Assembly might look to the OPS for advice and assistance on the administration and interpretation of its policies but that does not mean that they are then legally bound by that advice. In any event, none of that is relevant because the Legislative Assembly did create their own benefits as set out in the Manual of Administration.

With respect to the Commission's assertion that there was a special arrangement between Ms. Scotland and the Complainant that she would be allowed to bridge any shortcoming to her anniversary date, in the first instance this Board does not have any jurisdiction over that matter. That was part of the grievance that proceeded to the Speaker and was ultimately resolved by him. His decision is on these issues is final and binding. In any event, even if this Board did have jurisdiction, it is clear from the evidence that there never was an agreement. Ms. Scotland testified that she never made any such representation to the griever. While her memory was vague on all of these issues, the fact is, she knows very well how the policies at the Legislative Assembly are administered and testified that she would never have given such an assurance in the circumstances. Nobody that the

griever dealt with throughout the process agreed that it was possible to attribute service to the Complainant that she did not have. Dr. Todres, Mr. Thomas, Mr. Elston, the Clerk and the Speaker, all were in agreement on that.

The Commission has claimed that it was discriminatory of the Respondent not to provide sick leave benefits after March 10, 1988. That claim was never expressly stated in the original complaint. The Complainant cannot now make a claim for a denial of sick leave benefits that she did not make at the time. The Complainant has consistently grieved and objected to the denial of sick leave benefits between January 4, 1988 and March 10, 1988. The Complainant elected to receive maternity leave from March 10 for seventeen weeks. She did not ask for paid sick leave. An employee on maternity leave cannot claim sick leave benefits. The *Parcels, Supra* case discussed the mutual exclusivity of maternity leave and sick leave. It stated, at page 77, that if a woman chose to begin maternity leave while she is medically fit to work, she cannot be absent for health related reasons and claim eligibility for sick leave. The Board of Inquiry in the *Parcels* case clearly said that the rationale in *Brooks* would not apply in those circumstances.

The Commission relied heavily on the *Brooks, Supra* case. It was the Respondent' position that it does not apply in these circumstances. In the *Brooks, Supra* case the sick leave plan excluded pregnant women from coverage for ten weeks before and six weeks after the expected date of delivery. There is no reference in that decision to maternity leave. In those circumstances it is not surprising that the result reached was that there had been a violation of the *Code*. There was no attempt to relate the sick leave benefits with maternity benefits. The same is true of the *Bliss* and *Parcel* cases. In none of those cases were the Complainants on maternity leave. What each of them wanted was not maternity leave but sick leave and what all of those cases stand for is the proposition that, if you are in a situation of electing to take one or the other, you cannot be precluded from electing to take sick leave simply because you are pregnant. What they do not say is that you are entitled to maternity leave and sick leave benefits at the same time. For those reasons the *Brooks* case does not apply to the facts of the case before this Board.

If the Board should find *Brooks* to be applicable, then Section 25(2) of the *Code* is the Respondent's' defence. The evidence has established that the sick leave plan is a self insured benefit through a fund set aside by the Legislative Assembly for the provision of those benefits. The purpose of the plan is to indemnify employees against a loss of earnings during periods of sickness. Section 24(2) of the *Code* (now 25(2)) reads as follows:

> The right under Section 4 to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by an employee, superannuation, or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act* and the regulations there under.

Part X of the *Employment Standards Act* deals with benefit plans and subsection 34(2) states as follows:

> Except as provided in the regulations no Employer or person acting directly on behalf of an Employer shall provide, furnish or offer any fund, plan, arrangement or benefit that differentiates or makes any distinction, exclusion or preference between his Employees or a class or classes of Employees or their beneficiaries, survivors or dependents because of age, sex or marital status of his Employees.

Collectively these provisions permit discrimination on the basis of sex within a maternity leave for the purpose of providing benefits. In this situation there exists a "fund or arrangement" which includes "short term disability insurance or benefit plan, fund or arrangement" that is provided or offered by an employer to an employee for loss of income because of sickness, accident or disability. The STSP offered by the Legislative Assembly met the requirements of the regulations under the *Employment Standards Act* thereby allowing it to discriminate or make a distinction, exclusion or preference based on sex, which of course, in this case, includes pregnancy. The self insured plan of the Legislative Assembly is saved by section 24(2) of the *Code*. Insurance is not defined only as insurance provided by someone else. It is simply an arrangement where one party compensates another for loss on a specified subject. In this case the Legislative Assembly is the insurer and the Complainant is the insured. Whether the Legislative Assembly provides the insurance itself or whether it hires an insurance company to do so, does not detract from the fact that there is, between the employer and

the employee, a contract that provides for an indemnification for sick leave. If the Board were to accept the Commission's argument, benefit plans insured through a third party would be exempted under the *Code* whereas insurance plans provided directly through an employer would not. There is no basis in law or fact for that distinction. As a matter of policy interpretation, logic and common sense there is no reason this Board should accept the Commission's position that only through use of third party insurer can you receive the protection of the *Code*.

In *Leshner v. Ontario (No.2) (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inq.)*, the Great West Life Assurance Company had contracted with the Government of Ontario to provide policies of insurance covering group health, hospital care and dental care. The contract was for the administration of the plan only and the Government was responsible for payment of the benefits. The fund was created through employer and employee contributions held in reserve by Great West and drawn upon as payments were required. If the money had proven to be insufficient, the Government would have been responsible for making up the shortfall. The Tribunal in that case decided that the pension plan and the contract of group insurance complied with the regulations under the *Employment Standards Act*. While the scheme discriminated against gay and lesbian employees and same sex relationships, subsection 25(2) condoned that discrimination. That case confirms that a contract of self insurance fits within the definition of the regulations under the *Employment Standards Act*, through it the *Act* itself and, ultimately, the *Code*. The Divisional Court in Ontario approved the *Leshner* decision in the case of *Ontario Blue Cross v. Ontario Human Rights Commission (1993), 21 C.H.R.R. D/342 (Ont. Div. Ct.)*. If that exclusion applied to the Government in respect of its self-insured policy, it ought to apply to the Legislative Assembly and it self-insured plans.

In the alternative, the Respondent's' counsel took the position that in order for the Complainant to claim sick leave benefits postpartum, she must establish that, on a personal basis, her eligibility for those benefits. In considering the *Parcels, Supra,* decision, one of the questions before that Board was whether there could be some presumptive period when an employee would be entitled to sick leave simply by virtue of the fact that she had delivered a child. In that case, as in the one before this Board, the Commission relied heavily on the opinions of Dr. Enkin. The Board of Inquiry in the

Parcels decision rejected the notion that there should be any such presumption. There was sufficient deviation between individuals that it was unwilling to create an average. Not all women have normal pregnancies and not all women have sedentary jobs. In order to extend benefits, the Board of Inquiry required proof. It determined that each woman must establish her own health related absence period. In this case, there is no such proof. Dr. Enkin did not examine the patient. He specifically stated in his letter that the documentation he received did not allow him to make a judgment about this particular case. His comments were offered to address general issues. That qualifier alone renders Dr. Enkin's evidence and opinion in this case of little value. Respondent's' counsel also reminded the Board that expert opinion evidence is accepted by a tribunal so long as the witness has been properly qualified and the evidence relates to that individual's area of expertise. Dr. Enkin offered his opinion on whether the appropriate cut off date for sick benefits would be the date of delivery. Dr. Enkin's opinion on that matter is not offered as fitting within his field of expertise and, therefore, cannot be relied by the Board. Neither is he an expert in determining whether the public has a duty to support women during and after childbirth. That is a policy consideration for the government and outside of Dr. Enkin's field of expertise. Dr. Zaltz was the Complainant's doctor and his evidence indicated that following the delivery of her child, there were no physical problems. In response to a request from Commission counsel, he later commented on the fact that six days following delivery the Complainant was experiencing uterine tenderness and constipation which he treated. He suggested that the Complainant would not have been fit to return to work for at least up to sixteen or eighteen weeks. Dr. Zaltz reference to that time frame was as a result of the Commission's position and not based on his own view. The Board should attach no weight to Dr. Zaltz's view. There is no basis for his opinion regarding sixteen to eighteen weeks. That reference is self serving and is not the specific medical information the Board was seeking in the *Parcels* case.

The next issue was the allegation of discrimination on the basis of family status. The Commission's argument was that the Complainant was in a parent and child relationship. If she had not had a child, she would not have needed daycare. She was terminated because she refused to return to work until she could obtain that daycare. That, according to the Commission, is discrimination on the basis of family status. It was the Respondent's' submission that there is no nexus between the Complainant's

family status and her loss of employment. She did not lose her job because she was the mother of a child: she lost her job because she refused to return to work. She was not prepared to return to work because she refused to accept child care that did not meet her standards. It is her right and her choice to determine what is appropriate child care. It was not discriminatory to terminate her because she refused to come to work until she did. The reference in the *Code* to family status speaks to the fact of a parent/child relationship. The word "relationship" is only to identify the connection between the parent and the child. The definition does not go beyond status. It does not address the quality of the relationship between the parent and the child. It cannot be said that her termination arose from the mere status of Ms. Wight having a child. Respondent's' counsel offered several analogous situations where the *Code* would not apply. For example, if a person of colour was suffered from a disabling illness such that he could no longer attend work and could not be accommodated, his termination would be as a result of his disability and not as the result of his race or colour. Even if the disabling disease was unique to his race or colour, an employer would not be discriminating against him because of that race or colour if it decided to terminate him in those circumstances. As well, it would not be considered discrimination if a woman refused to attend at work because she was in the midst of a marital breakdown and because it was decided that, in order to deal with the marital problems, a six month trip to an exotic locale was necessary. It would not be reasonable to assert that the status of her being married would encompass her right to absent herself from work because of some assessment that the quality of her relationship was suffering and needed to be dealt with. Similarly, if a parent believed that his/her child could not get adequate education within the school system and determined that they needed to home-school that child, it could not be argued that parent would be entitled to a leave of absence in order to do that. Not every aspect of a child or parent's life is subject to the *Code*. The classic examples of discrimination on family status involve refusals to hire someone because of their parent or child. Those are distinctions based on the existence of the family status and distinguish those circumstances from this case. The reason for the Complainant's termination was not because she had a child but because she refused to return to work. The Complainant is not unique in these circumstances. Other parents work at the Legislative Assembly and have placed their children in daycare. A choice was made within this family unit that only a certain standard of child care would suffice. The Complainant refused to return to work until she could obtain that standard of child care and that was her choice. Allegations of discrimination arise because someone believes

that they have been selected for different treatment. In this case the Complainant chose the route she intended to take with respect to child care. There was no rule in place at the time that singled her out for different treatment. She did that herself.

A similar issue arose in the context of an arbitration hearing (*Toronto Star Newspapers and Southern Ontario Newspapers Guild* (1990), 12 L.A.C. (4th) 273 (Brent), in which the Board rejected the argument that the right to be accommodated can arise simply on the basis of an individual parent's assessment of what is best for her child.

Barrash v. Bowen (1988), 846 F.2d 927 (4th C.r.) case had a similarity to the instant case. The plaintiff in that case had been given a leave under a policy that provided for a six months maternity leave. The woman wanted additional time for breast feeding her baby and it was granted. The next time she became pregnant the policy had been amended and she was denied that additional leave. She wanted the six-month leave she had been granted in the past. She then embarked on a course of conduct which was designed to give her what she wanted, irrespective of the wishes of her employer that she return to work. In that case there were a number of physician's notes which appeared to justify her requests and several extensions were given by the employer which brought her very close to the sixth month she had originally requested. Ultimately the employer refused to allow any more extensions and directed her to return to work on a certain date. She did not and she was terminated. She brought an application before the U.S. Court of Appeal that she had been discriminated against. The matter had been processed through the grievance procedure and the only issue remaining for the Court to consider was whether there had been discrimination against an her because of her request for a leave in order to take care of her baby. The Court described the Complainant in the following terms:

> It is likely that this controversy arose of the Plaintiff's unwavering determination to take maternity leave for a full six months following the birth of her baby. That was her initial request and she staunchly refused to return to work any sooner. The employer's warnings of disciplinary action, including termination of her employment if she failed to meet successively established deadlines went unheated...

> ...had defined her own rules to govern her employment relationship and she conceded nothing to the employer's right to fashion and enforce rules governing that relationship.

The comment of the Court concerning this issue before it were as follows:

> She may have a constitutional right to nurse her baby for six months or even longer that would inhibit intrusive Government interference with it, but the Plaintiff here asserts no right to be let alone while she cares for her baby in the manner she thinks best. Her claim is one of entitlement to the full six months of maternity leave she demanded. The public employer may have some duty to take reasonable steps to accommodate the needs of young mothers and their babies, but the measure of any duty of reasonable accommodation is not the same as the measure of the mother's right to care for the child as she pleases.

A review of the evidence will show that the Complainant was not seeking accommodation to allow her to return to work. She was seeking accommodation that relieved her of her obligation to come to work and that is not what the law requires. Accommodation is intended to assist a person to return to work. There are also obligations on the employee seeking accommodation to cooperate with the employer in its efforts to return you to the workplace. Obtaining day care was totally within the control of the Complainant, not the Respondent, and the open-ended nature of her request indicated an unwillingness on her part to take control of that issue and deal with it in a way that was acceptable to the Respondent. The Respondent did accommodate the Complainant. She was granted an additional seven weeks to find appropriate day care. The Complainant was aware early on in her pregnancy that there was some chance that she might not be able to carry the baby to term. Nevertheless, she blindly refused to do anything about that situation. She organized her life in such a way that she could continue to ignore the possibility that her baby could be born before her anniversary date and not take appropriate steps to deal with that aftermath. She was aware in April of 1988 that she was not eligible for paid maternity leave, which meant that she was also not eligible for an extension of her maternity leave and yet she expressed surprise in July when she was notified that she was to return to work. That is another example of the Complainant's refusal to deal in a real way with her situation. She knew that she was entitled to seventeen weeks of maternity leave following the birth of her child. She was, in

her own words, on a certain trajectory, which did not include a return to work before October of 1988 at the earliest and January of 1989 at the latest.

Her discussions with the Clerk about her attempts to find day care in August are further proof of her real intentions. She told the Clerk on July 6, 1988 that it was impossible to find day care. She had not even looked at that point in time. She made an assumption that it would be difficult. On July 27, 1988 she paid a week's rent at a cottage. Those are not the actions of someone who is interested in returning to work. They are the actions of somebody who intended to remain off work long enough to take a vacation at a cottage and a further example of the Complainant's attitude that she was entitled to and fully intended to take maternity leave for at least six months and longer, if possible.

Ms. Beach was qualified as an expert on policy regarding day care, not availability. Her opinions as to licensed day care were simply that, opinions, and not within her field of expertise. The Board should not place any weight on those opinions.

Respondent's counsel stressed that there was, in fact, evidence before the Board that Ms. Wight was needed back at her job. Commission counsel has suggested that that was not the case but Mr. Gardner and Ms. Smith's evidence was clear on that point. There can be no doubt but that she was needed.

There was much evidence and discussion about concerns that the Complainant had jeopardized her non-partisan status throughout the grievance process. Respondent's' counsel made it clear that had the Complainant admitted her affiliation with the NDP party in Manitoba when she was being hired, she would not have been hired as a research assistant. The requirement that members of the Office of the Legislative Assembly provide unbiased apolitical opinions to all party members has been described and must be accepted by the Board without question. The Complainant was less than forthright on her interview when she denied any previous affiliation with the political party. The reasons for the requirement for non-affiliation was explained to her at that time. Her

answer was clearly intended to avoid having to respond in the affirmative by making a distinction between other Provinces and Ontario politics. Many of the cases suggest, that in circumstances where a person is found to have lied about something that is fundamental to the basis upon which they were employed, that was grounds for termination no matter when it became known to the employer. The *Canadian Airlines decision, Supra* involved a pilot who lied about his qualifications on a job application and then claimed to have been discriminated against when she was not hired. The Canadian Human Rights Tribunal found that there had not been discrimination. Thus, in any event, even if there had been discrimination, the Complainant was not entitled to be considered for the job because she misled them on the application.

Respondent's' counsel reminded the Tribunal that the issue of the Complainant's's history of partisanship became an issue during the proceedings when concerns were raised about the fact that she had contacted various politicians. Again the Complainant was less than forthright in that she denied contacting Mr. Cook and suggested that contact was made by her representative, Mr. Moore, not her. Subsequently she conceded that Mr. Moore contacted Mr. Cook as her agent and that she was aware at the time that he was doing so. That, however, is another clear example of how the Complainant manipulates the truth to her own end. Even if she had been able to explain her contact with Mr. Cook, she can not explain her continued contact with other politicians throughout that period of time. Her partisan activities should disentitle her from any rights to reinstatement. The active nature of her partisan activities during the proceedings and the misleading information she gave on hire should disentitle her to any consideration.

Finally Respondent's' counsel commented on the delay involved in processing this complaint. To the extent that the delay might have affected people's memory, particularly if credibility becomes an issue, Respondent's' counsel suggested that the delay lies at the feet of the Commission and that the Respondent's' witnesses should be given the benefit of the doubt in the circumstances. With respect to the issue of costs, he pointed out that much of the evidence in this case involved the allegations of harassment. It was his submission that ultimately there was no foundation for that complaint. Had it been properly filed and investigated when the initial complaint was filed,

the Commission would not have proceeded in the circumstances. All that the Board has before it is the coloured perceptions of an individual which are unsupported by any objective evidence. Respondent's' counsel asked for costs with respect to 80% of the time spent dealing with the harassment aspect of the complaint.

The Respondent relied on the following cases: *Leshner v. Ontario, Supra*; *Ontario Blue Cross v. Ontario Human Rights Commission, Supra*; *Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Supra*; *Re Ontario Blue Cross, Muir*, August 18, 1995, E.S. 68/93 - 358; *Re Nygard International , Muir*, March 23, 1993, E.S. 68/93 - 209: *Lake Ontario Portland Cement Co. v. Groner* (1961), 28 D.L.R. (2d) 5589 (S.C.C.): *Millard v. Seven Continents Enterprises Inc.* (1992), 44 C.C.E.L. 119 (Ont. Ct. (Gen. Div.); *Board of Education of Prince Albert Rural School Division No. 56 v. Teachers of Saskatchewan* (1995), 123 D.L.R. (4th) 583 (Sask. Q.B.); *Regina School Division No. 4 v. Teachers of Saskatchewan*, [1995] S.J. No. 208 (Sask. Q.B.); *Teachers of Saskatchewan v. Blaine Lake School Division No. 57*, [1995] S.J. No. 397 (Sask. Q.B.); *Royal Insurance Co. of Canada and Ontario Human Rights Commission* (1985), 51 O.R. (2d) 797 (Div. Ct.); *Romano v. Board of Education, City of North York* (1987), 87 C.C.L.C. 16,343 (Ont. Bd. of Inq.); *Canada (Attorney General) v. McKenna* (1994), 22 C.H.R.R. D/512 (Fed. C.A.); *Bliss v. Attorney-General of Canada,* Supra; *Cornell v. Rogers Cable Systems Inc.* (1987), 17 C.C.E.L. 232 (Ont. Dist. Ct.); *Shafer v. Pan Matrix* (1987), 80 A.R. 378 (Q.B.): *Werle v. Saskenergy Inc.*, [1992] S.J. No. 291 (Sask. Q.B.); *Re: Douglas Aircraft Co. and U.A.W.* (1973), 2 L.A.C. (2d) 147 (Simmons); *Re: McKenna and The Crown* (1980), 28 L.A.C. (2d) 410; *Weyerhaeuser Canada Ltd. and I.W.A. Local 1-423* (Vickers, B.C.); *Barrash v. Bowen, Supra, University of British Columbia v. Berg* [1993] 2 S.C.R. 353

REPLY OF THE COMPLAINANT

Commission counsel took the position that the Respondent did not provide the Board with any evidence to show that efforts were made to accommodate the Complainant to the point of undue hardship. There was some evidence about other people who had left while the Complainant was absent but none of that evidence indicates undue hardship.

The Commission repeated its argument that it was not attacking the *Employment Standards Act* when it was asserting that a policy that is in conflict with the *Code* results in discrimination if the benefits under the policy are not offered equally to all employees. If the Board should find that the Complainant was discriminated against because the benefits were not offered to her in an equal manner on the basis of her sex or that the Legislative Assembly did not offer their benefits in an equal manner to women, the only conclusion the Board can reach is that, even though they may exceed than the *Employment Standards Act*, they are not protected by it. She took the position that the denial of maternity leave benefits to the Complainant because she had not completed a year of service was discriminatory in relation to other benefits that were offered by the Respondent.

With respect to the issue of Section 24(2) of the *Code,* Commission counsel submitted that the Legislature found it necessary to have certain exceptions within the *Code* for insurance contracts because the entire basis of insurance is contrary and, in fact, in conflict with the *Code*. The philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics. Insurance rates, on the other hand, are based on statistics relating to the degree of risk associated with a class or group of persons. Sometimes the class or group classification will coincide with a prohibited ground of discrimination, bringing the rating scheme into conflict with human rights legislation. The Legislature has decided that it is reasonable to allow that inconsistency or conflict in a democratic society and, to that end, it has used different criteria when considering insurance companies and insurance contracts. Rather than deal with it in terms of absolute restrictions on discrimination, section 24(2) refers to reasonable and *bona fide* grounds. Human rights legislation on the other hand has been described as having a "special nature, not quite constitutional, but certainly more than the ordinary." Exceptions to the human rights legislation should be narrowly construed. It is establish law that tribunals and courts should interpret human rights legislation in a remedial and purposive way, while exceptions should be interpreted very narrowly.

She reminded the Board that the only evidence about the Legislative Assembly's benefits was presented by the Commission. The Respondent offered no evidence about how the plan was

administered. The evidence that was presented from Ms. Schoenberger was that the STSP is administered through regular payroll and not through any special fund. Regular payroll cannot be considered a fund. A plain reading of Section 25(2) indicates that the word "fund" is modified by the adjectives "Employee Superannuation Fund" or "Pension Plan" or "Pension Fund". The word does not stand on its own. Black's Law Dictionary, 5th ed. (St. Paul Minn: West Publishing Co. 1979) states "insurance is a contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." There is no such consideration in this instance. There is no evidence that a premium is being paid by the employee or the employer.

Commission counsel asserted that in order to come within section 24(2), the benefit would have to be an employee superannuation or pension fund or a contract of group insurance between an insurer and an Employer. In the *Leshner, Supra,* case, there was a self insured fund or plan that came within the ambit of the exception. There was an outside insurer, Great West Life, and it administered the self-insured plan. That is not the case here. There is no self-insured fund or plan or contract of group insurance. A general rule of statutory interpretation requires that a series of examples be read as being of one kind or sort. In this case the 24(2) refers to an employee's superannuation or pension plan or fund. It does not refer to maternity benefits and maternity benefits are not of a similar type as the others mentioned specifically in the section. It is also an accepted rule of interpretation that words be given their plain and ordinary meaning. Respondent's' counsel has suggested that maternity benefits be accepted by the Board as being part of a fund. However, Ms. Mahaney and Ms. Schoenberger testified to the contrary. Maternity benefits are not paid pursuant to an insurance policy or a special fund set aside for that purpose.

Section 24(2) does not state that a benefit that complies with the *Employment Standards Act* is automatically exempted from the *Code*. It says specifically a superannuation plan or a pension plan or fund, it does not include other benefits in that list.

Once a *prima facie* act of discrimination has been proven, the burden shifts to the Respondent to show that the discrimination is defensible under the *Code*. In this case the Respondent's submitted

no evidence to support their position that the exclusion applies. The only evidence before this panel is that of Ms. Schoenberger's and Ms. Mahaney's both of whom said that the benefits are funded through payroll and not through any private or specific fund or plan.

DECISION

THE STATUTORY FRAMEWORK

The *Human Rights Code 1981* provided that a person had the right to be free of discrimination at his or her workplace on the basis of his/ her sex or family status. Family status is defined as being in a parent and child relationship. The *Code* was amended in 1986 to include pregnancy in the protective umbrella of "sex".

In 1987, at least as far as adverse effect discrimination was concerned, once it was determined that a rule, policy or practice did discriminate on a prohibited ground, it was only necessary to establish that the requirement in question was reasonable and *bona fide*. That section of the *Code* was amended in 1988 so that a requirement was deemed not to be *bona fide* and reasonable unless the needs of the group of which that person is a member could not be accommodated without undue hardship.

Section 24(2) of the *Code* provides an exception to the prohibition of discrimination based on sex and family status provided the employer can fit itself within the exemption provided for by the *Employment Standards Act* and the regulations made under it. It reads as follows:

> 24(2) The right under Section 4 to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the Employment Standards Act and the regulations thereunder.

"Fund" is defined in Black's Law Dictionary, Supra, as "an asset or group of assets set aside for a specific purpose. "Insurance" is further defined as "a contract for stipulated consideration where

one party undertakes to compensate the other for a loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the "insurer", the other party is called the "insured".

Part X of the *Employment Standards Act* deals with benefit plans. Subsection 34(2) provides that a benefit plan provided by an employer cannot discriminate against an employee on the basis of age, sex or marital status unless otherwise provided in the regulations. *Employment Standards Act Regulation 282* defines "disability income insurance or benefit plan" to include a fund or arrangement, including STD as follows:

> (e) "Disability Income Insurance or Benefit Plan" includes a plan, fund or arrangement provided, furnished or offered by an employer to an employee that provides benefits to an employee for loss of income because of sickness, accident or disability and includes,
>
> (i) a short term disability income insurance or benefit plan, fund or arrangement that is other than a long term disability income plan.

That regulation allows an employer's benefit plan to exempt female employees from entitlement to STD or LTD benefits during a maternity or pregnancy leave of absence to which she would be entitled under Part XI of the *ESA*.

The *Employment Standards Act*, Part XI deals with pregnancy leave. Subsection 36(1) provided that a woman was not entitled to an unpaid maternity leave until she had been employed for twelve months and eleven weeks. If she met the service threshold she would be entitled to a seventeen-week leave. Section 35 allowed the employer to impose a maternity leave upon an employee when she was unable to carry out the duties of her position or her work was materially affected by the pregnancy.

THE LEGAL FRAMEWORK

The Supreme Court of Canada has recognized that there is a distinction between direct and indirect

or adverse effect of discrimination. Direct discrimination in the employment context involves decisions based upon prohibited grounds of discrimination which result in adverse employment consequences to a person or group. Any justification for direct discrimination must be based upon a statutory exemption such as a *bona fide* occupational qualification or requirement.

Indirect or adverse effect discrimination arises when an rule, which is neutral on its face has an adverse effect upon a group identified by a prohibited ground of discrimination when it is applied. The onus of establishing the existence of discrimination whether, direct or adverse effect discrimination, is on the Commission. To establish that adverse effect discrimination has occurred it is necessary to demonstrate a nexus or causative link between the prohibited ground of discrimination, the adverse effect complained of, and the neutral rule of general application. If the Commission can demonstrate a *prima facie* case of adverse effect of discrimination, it remains for the respondent to demonstrate that it has taken steps to reasonably accommodate the person or group adversely affected. The obligation to accommodate in cases of adverse effect discrimination, however, is not an obligation which lies exclusively upon the employer. The employee or group adversely affected must, as a precondition to entitlement to accommodation, be *bona fide* in their position. There also exists a duty on a complainant to take such steps that may be reasonable in order to facilitate the accommodation he/she seeks.

The proceedings in this matter required more than twenty days of hearings, hundreds of exhibits and numerous witnesses. The parties have placed several issues before this Board for determination.

1. THE POLICIES OF THE LEGISLATIVE ASSEMBLY

The first concerns the Complainant's allegation that the Respondent applied their policies in an unequal and discriminatory fashion by refusing to exempt the Complainant from the strict application of those policies even though other OPS employees were granted exemptions. The Respondent's' answer to that allegation is that the Legislative Assembly is not bound by the policies and practices of the OPS. Its enabling statute allows it to set its own policies. Only if

it fails to do so is it deemed to have adopted those of the OPS. The Respondent's' argument succeeds, in part. The Manual of Administration is proof that the Legislative Assembly, pursuant to its powers under the *Legislative Assembly Act,* adopted its own policies respecting benefits, including sick leave, maternity leave and discretionary leaves of absence. Those policies were virtually identical to those in the OPS. Even so, that, in and of itself, would not necessary have bound the Legislative Assembly to the same application of those policies. However, they, by their own actions, sought and accepted the advice and direction of the OPS in how to apply them. In addition, their application of the policies was identical to the policies of the OPS. They cannot, in those circumstances, disown those same policies to avoid responsibility for their decisions. The policies of the Legislative Assembly, while adopted specifically for the Legislative Assembly, were then, in form and practice, identical to those of the OPS.

There is, however, not enough evidence to conclude that the Complainant was unfairly dealt with under those policies vis-a-vis other employees. The only example provided was from Ms. Beach. Although she gave evidence about her particular circumstances, there was no evidence concerning any other factors, if any, that were taken into account in granting her maternity leave. One example of an exception to the rule is not enough to persuade me that the Respondent treated the Complainant in a discriminatory manner in relation to other employees.

2. HARASSMENT

The majority of the hearing days involved the allegations of harassment, which commenced, according to the Complainant, as early as September or October of 1987 and continued until her termination. She testified at great length about the events giving rise to the complaint. From that testimony it was clear that even at the hearing, years after those events, she continues to feel genuinely aggrieved by the Respondent. But what was equally clear was that she viewed, then and now, these events through her own personal telescope. That telescope allowed her to focus very narrowly on the things she wanted and to ignore, or as Respondent's' counsel stated, filter out, anything she did not want to hear. Everything she wanted was clear and fixed in her mind. Anyone

or anything that interfered with her plans did so intentionally and deliberately to harass and frustrate her. She did not and could not see outside the limited scope of that telescope. For example, she was visibly angry when she described how Ms. Schoenberger fraudulently changed the Request for Leave form after she had signed it. Even when it was pointed out to her that she had done the same thing, she shrugged it off as if that was insignificant compared to those of Ms. Schoenberger.

Dr. Januszewska stated that "she made a big issue of "thinking positive" and was very reluctant to explore the fact that there were any fears that the outcome of this pregnancy might be less than favourable". She described her as a "very tightly controlled woman". That attitude was obvious at the hearing. As she relived the events of late 1987, she became more and more tense and excitable. The emotions these memories evoked were strong and immediate. Years later she was still unwilling to consider suggestions that alternative reasons and/or motives might have played a part in these events. She maintained that she did nothing wrong by concealing her previous affiliation with the NDP in Manitoba. When it was suggested to her that she had misled the Respondent in her interview, she rejected that suggestion as being without merit. She refused as well to consider whether that affiliation could give rise to concerns about a bias in her research. She was sure she could separate her personal views from her professional obligations.

This was but one example of many of her single-minded approach to life. Once she made up her mind, nobody could say or do anything to change it. If they tried, they were dismissed as being unreasonable and unfair. There was no other perspective but that of the Complainant. Her allegations of harassment must be considered in that light.

Dealing first with the pre-delivery events, it was her belief that Ms. Smith's and Dr. Gardner's attitude towards her changed after they were told about her high risk pregnancy. From that point on they criticized the quality and quantity of her work, they complained about the fact she was late every day and continued to burden her with too much work, especially in light of her condition. She begrudgingly admitted, however, that they had reason to be concerned about her

work. On the basis of one of the research projects she handed in at that time, their concerns were not unwarranted. It appeared to be, as Dr. Gardner testified, unorganized and lacking focus.

The Complainant told the Board and the Respondent at the hearing that she was under a great deal of stress at the time that directly affected her ability to do her work. Unfortunately she never told that to Ms. Smith or Mr. Gardner at the time. Perhaps if she had, they might have been more sympathetic towards her. Even if they were not as sympathetic as she would have liked, it cannot be said that they deliberately adopted a harsh and critical attitude towards her once they became aware of her high-risk pregnancy. Her work was not up to the standards they had come to expect from her. The support staff complained about difficulties in typing her assignments. The paper work she gave them to type was in an unorganized and untidy mess. The focus of the research was unclear. I accept her explanation that, in part, her assignments were more difficult to organize because she was not using the VDT. Even so, Ms. Smith's and Dr. Gardner's concerns about her work were neither unreasonable nor unfair. The Complainant simply refused to accept their criticisms as justified. She felt they should have known how she was feeling and adjusted their approach to her accordingly. More specifically, they should have recognized the stress she was under and reduced her workload accordingly. The fact that they did not was proof, in the Complainant's view, of their harassment of her. I disagree. The Respondent did not know, and could not know without being told, about the state of the Complainant's mind. When they commented on her work, they did so out of a reasonable concern of her ability to do the work. They did not, in my view, do it to intentionally harass the Complainant. If the Complainant was feeling particularly vulnerable, it was up to her to advise the Respondent that there was an explanation for her substandard work. Until or if she did, she could not expect them to treat her any differently that any other employee in the same circumstances.

She also believes that their criticisms about her late arrivals at work was unreasonable and part of the harassment. She had decided that she had a valid reason for her lateness and could not understand why her employer would take issue with that. She would not or could not accept the

fact that her employer was entitled to set the terms and conditions of her work, including her hours of work. When it did object, she dismissed it as harassment.

There was considerable evidence about the harassment the griever experienced while she was in the hospital before and after her delivery date. She believes that Ms. Schoenberger and Ms. Scotland harassed her by repeatedly sending over and calling about the Leave of Absence forms. It is not difficult to understand the Complainant's frustration and even anger about the fact she was being denied sick leave and maternity leave. But the evidence does not support her allegations. Ms. Scotland and Ms. Schoenberger were persistent in their efforts to process her leave of absence through the proper channels. They were at cross-purposes with her. The Respondent believed that the procedures in place required the proper characterization of and approval for a leave. The Complainant believed she was entitled to maternity and sick leave and refused to sign the forms until they her leave was properly characterized. Because neither knew or understood the motives of the others, the Respondent concluded that the Complainant was being deliberately stubborn and the Complainant believed she was being harassed. In the first instance, if the Complainant believed she was being harassed, she could have and should have communicated her feelings to the Respondent. How else could they have known she viewed their actions as harassment? While she was in the hospital on bed rest, she had no restrictions placed on her activities from bed. She had numerous visitors and made several phone calls from her bed. There was no reason for Ms. Scotland or Ms. Schoenberger to think that their contact with her would be inconsistent with that level of activity. Obviously it was not the contact itself but rather the message that was unwelcome.

While it is true that the Respondent were persistent, that persistence was directly attributable to the Complainant's refusal to complete the forms. The Commission has argued that the Respondent harassed the Complainant by rigidly adhering to a rule about leaves of absence that had an adverse effect on the Complainant. The Respondent did adhere, perhaps even rigidly, to a rule that all leaves of absence be characterized and approved before they were granted. Setting aside the issue of whether the leave had been properly or improperly denied in the first place, the Respondent

actions in pursing their goals were not based on any prohibited ground in the *Code* but rather on personnel policies that applied to all employees on any leaves of absence. Neither can it be said that the effect of the application of those policies had an adverse effect on the Complainant on a prohibited ground.

The Complainant also believed the Respondent harassed her by insisting she return to work in July rather than allowing her to obtain suitable daycare. For reasons to be explained later, the allegations are dismissed. Again, what she characterized as the Respondent's's persistent and unreasonable demands developed as a direct result of her refusal to recognize their rights to make demands in the first instance. She was, as she herself admitted, on a "certain trajectory" and viewed any opposition to that as harassment.

Even if the Complainant is successful in her allegations of discrimination on other grounds, she must also take responsibility for her own actions. Her stubborn refusal to consider other factors during this time was the directly related to the Respondent's treatment of her. If she did not advise them of her stress and vulnerability, they cannot be faulted for not intuitively knowing of her needs and accommodating her accordingly. If she felt they were pressuring her too much, she could have and should have put them on notice that their actions were adding to her stress and were unwelcome.

3. SICK LEAVE POLICY

The Complainant has alleged that the Respondent discriminated against her by denying her sick leave benefits. The Commission took the position that the policy itself discriminated against pregnant women by denying them the benefits directly. In addition, the sick leave provisions offered a package of benefits that was unequal to pregnant women resulting in adverse effect discrimination.

Two Ontario decisions that were issued in June and August of 1996 have direct application to this case. The first, dated June 4, 1996 from the Divisional Court, involved the judicial review of an

arbitration award upholding an employer's decision to deny sick leave benefits under a collective agreement during a portion of a maternity leave (*Ontario Secondary School Teachers' Federation, District 34 v. Essex County Board of Education* (June 4, 1996) Ont. Div. Ct. (Adams, O'Leary and Borins). The griever in that case requested a seventeen week maternity and ten week parental leave. She asked that the maternity leave commence on the date when her health permitted a return to work, followed immediately by her parental leave. She requested sick leave for a period of time after her delivery and was refused. Her grievance was advanced to arbitration and the Board dismissed her grievance. The Divisional Court referred to the *Brooks* decision in which Chief Justice Dickson, at pages 334 and 335, stated:

> The first two claims, that pregnancy is neither an accident nor an illness and that it is voluntary, are closely related. I agree entirely that pregnancy is not characterized properly as a sickness or an accident. It is, however, a valid health-related reason for absence from the workplace and as such should not have been excluded from the Safeway plan. That the exclusion is discriminatory is evident when the true character, or underlying rationale, of the Safeway benefits plan is appreciated. The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery - which sort of comparison the respondent's argument implicitly makes, is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context, pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.
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> ...
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> In sum, if an employer such as Safeway enters into the field of compensation for health conditions and then excludes pregnancy as a valid reason for compensation, the employer has acted in a discriminatory fashion.

It also referred to the *Parcels* decision in which the Alberta Court of Queen's Bench determined that employers must treat the health-related portion of a maternity leave in the same manner as other health-related leaves. It stated, at page 711:

> It is clear from the evidence before the board of inquiry that at least a portion of any maternity leave is health-related. The collective agreement does not categorize maternity leave under sick leave which includes illness and accident but rather places it under leaves of absence which include general leave, bereavement leave, adoption leave, paternity leave, educational leave and court appearance. It is obvious that maternity leave should not be treated like the other leaves with which it is placed as it is the only one that has a health-related component. However, it is not identical to sick leave as there is often a non-health related component. It cannot be neatly pigeonholed because of it hybrid nature. Certainly that part of maternity leave that is health-related needs to be treated like sick leave but, because of its interrelationship with a health-related leave, any voluntary maternity leave cannot be treated identically with other leaves. It is a unique situation. As a result, maternity leave should be removed from the leave of absence article in the collective agreement and placed in a category itself.
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> ...
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> An employee is entitled to take a voluntary maternity leave prior to a health-related maternity leave. At the time that the employee wishes to change her status, it will be incumbent on her to satisfy the employer as with any health-related matter that she is legitimately absent for a health-related reason. A pregnant employee is not required to choose between a voluntary leave and a health-related leave.

The *Parcels* decision also stands for the proposition that, if an employer decides to provide alternative benefits, those benefits need not be identical but must offer "substantially the same support".

In reviewing the decision of the arbitration board in the *Essex County* case, the Court noted that it had accepted the evidence before it that the griever was unable to work for "perhaps four to six weeks" after her delivery for health-related reasons but then read down the phrase "physical disability" in the collective agreement to exclude her from coverage. In doing so it adopted an interpretation of the collective agreement that contravened s.5 of the *Code* and discriminated against pregnant women. The Court also noted that the *Employment Standards Act* did not codify minimum

sick leave benefits or provide paid maternity leave for the health-related portion of the leave and did not purport to set standards for all potential employment benefits and so did not assist the majority of the Board in its decision. The majority's decision was found to be patently unreasonable. However, while it was prepared to accept in principal the fact that a maternity leave would contain a portion that was health-related, it was not satisfied that the actual period of the griever's disability had been established and remitted the matter back to the board of arbitration for a precise determination.

Another panel of the Board of Inquiry was asked to determine many of the issues before this Board in *Crook v. Ontario Cancer and Research Foundation and Ottawa Regional Cancer Centre* (August 26, 1996) (Dawson) Decision # 96-028. In that case, the complainant asked for sick leave following the birth of her child. She was placed on maternity leave by the respondent and deemed ineligible for sick leave. That raised the issue of whether pregnant women were entitled to access their employment sick leave benefits for health-related absences from the workplace after childbirth. The employer in that case, as in the proceedings before me, argued that the denial of sick benefits was proper because all employees on leaves of absences were treated in the same manner, irrespective of the reasons for the leave. That Board was persuaded by the reasoning of the Divisional Court in *Essex County* (*supra*) that "there is nothing unusual or illogical in finding an integration or overlap" of employee sick leave and maternity leave benefits. It stated that "as such, the moment of birth or commencement of a maternity leave does not of itself displace eligibility for sick leave benefits". It rejected the respondent's argument that it was entitled under the *Employment Standards Act* to put the complainant on maternity leave once she delivered her baby. It interpreted the *Act* to allow women to choose whether to apply for maternity leave before and after birth. It explicitly accepted the Commission's argument that an inherent component of the right to equal treatment is the ability of the individual to choose how and whether benefit options will be utilized and that to force a woman to apply for government benefits under U.I. rather than collect employment benefits would be to " imprison her in her privileges".

The respondent in that case submitted that it was protected by section 25(2) of the *Code*. The Board of Inquiry began by reaffirming the remedial nature of the *Code* and the *E.S.A.* and the premise that

defences were to be strictly construed by giving preference to an interpretation that does not conflict with the policy objectives of the *Code*. The Board stated, at page 52:

> The defence contained in section 25(2) has a very particular structure. I do not accept the disjunctive interpretation of section 25(2) urged on me by the Respondent, who argue that it should be read as applying to a "superannuation or pension plan" , "a fund", or "a contract of group insurance" and hence having application to the Oncologists' sick leave "fund". In my view, the term "fund" is used in section 25(2) an (sic) alternative to the term "plan" and both terms relate only to pension arrangements. The remaining scope of the section is to employee benefit plans provided under a contract of group insurance with an insurer. The rationale for section 25(2) is open to debate. However, it is noteworthy that in both situations referred to there are distinct factors external to the employer and beyond their direct control (which even so may not provide sufficient justification: see Leshner, supra). Moreover, contracts of insurer are governed by particular legislation, as are pension arrangements also which invoke bi-jurisdictional factors (ie. The federal Income Tax Act). The sick leave available to the Oncology Associates was an internal plan at least partially funded by revenues generated by the Oncologists. It was not provided under a contract of group insurance. As such it is outside of the scope of the exemption from sections 5 or 10 of the Code provided by section 25(2).

Those cases reflect the current state of the law on the issues referred to above. In summary, it is accepted that there is a health-related component to leaves of absence for pregnancy, the duration of which depends on the facts of each individual case. An employee has the right to choose whether she will apply for maternity leave under the *Employment Standards Act* or apply for employment benefits including sick leave. An employer who denies sick leave benefits in those circumstances is in breach of his obligations under the *Code* to provide a workplace free from discrimination on the basis of sex.

But I was not asked to consider the law in a vacuum. The question is whether this employer discriminated against this employee and, based on the evidence before me, the allegations have been proven, in part. In this case, the Complainant's request was consistent; sick leave benefits from January 4 to March 10, 1988. Initially she was denied sick leave benefits on the basis of the Mr. Laberge's opinion. That opinion was based solely on his interpretation of the sick leave policy which specifically excluded from its provisions pregnant women who were absent from work for

pregnancy related reasons. A subsequent opinion later in the year was much more comprehensive and based on more current legal and social developments. That opinion concluded that sickness benefits would be payable for absences attributable to pre-existing conditions aggravated by pregnancy, which included the Complainant's condition of incompetent cervix. It further stated that even medical conditions not characterized as pre-existing but simply as abnormal would qualify. Mr. Stoodley's advice was to amend the Legislative Assembly's Manual of Administration to reflect the current state as he believed the subject would become increasingly important as the number of women in the work force increased.

It is clear from that memo that the Legislative Assembly, and indeed the government itself, when it reviewed that opinion determined that they had been applying the sick leave policies in a manner that was discriminatory. It is equally clear that, once a legal opinion on the issue was sought, they both amended their policy and its application to conform to that opinion. They paid the Complainant sick leave benefits from January 4, 1998 to March 10, 1998, as requested.

The Respondent argued that they had the right to place the Complainant on maternity leave on January 4,1998 and that, once she was on a maternity leave, she was ineligible for sick benefits. All employees on a leave of absence for any reason would have been ineligible for the same reason. As was suggested in *Crook*, *Supra,* at page 31, "where the alleged source of the discrimination is being placed on a leave of absence and denied sick leave benefits due to membership in a protected group (here, pregnant and recently delivered women), to put aside the reason for being on leave of absence and to compare treatment across this group, is highly circular, even disingenuous".

The legal opinion of Ms. Pettigrew, the author of Mr. Stoodley's opinion, was that the Complainant was not entitled to sickness benefits after March 10, 1998. Recent decisions of human rights tribunals and the courts would suggest that opinion is not now current. Both the *Brooks* and *Parcels* decisions have taken great steps to overturn the outdated jurisprudence that allowed for discriminatory treatment of pregnant women as long as all pregnant women were

treated in the same manner. The *Essex County* and *Crook* case affirmed the reasoning in those cases. The unique circumstances of pregnancy have now been recognized, as has the inappropriateness of characterizing it under general leaves of absence. Pregnancy involves a voluntary and health-related reason for an absence from work. To ignore the health-related reason is to ignore the nature of pregnancy and results in unequal and unfair treatment of pregnant women.

However, irrespective of what rights a pregnant woman in these circumstances might have, she can hardly complain that she was denied those rights if she did not ask for them. As stated before, the Complainant requested and received sick leave benefits from January 4 to March 10, 1988. This hearing was convened the determine whether this Respondent discriminated against this Complainant when it denied her sick pay after March 10, 1988 because she was absent from work for pregnancy related reasons. If the allegations are proven, certain consequences flow to the Respondent for that breach. It would unfair in the extreme to charge these Respondent with the liability for refusing to grant the Complainant something she made no claim for at the time. It can hardly be said she was denied her rights in those circumstances.

4. FAMILY STATUS

The Complainant has alleged that she was discriminated against on the basis of family status. It was stated on her behalf that if she had not been in a parent-child relationship, she would not have been required to obtain day care. Because she could not secure the appropriate day care, she could not return to work as requested and was terminated. While there might be situations where that argument might prevail, this is not one of them. In the first instance, an employer is not unreasonable for requiring an employee on a leave of absence to return to work when the leave expires. There is a reasonable expectation that an employee on a leave of absence will take whatever steps are necessary to do so. In this case, the Complainant steadfastly refused to acknowledge the Respondent's rights in this regard. She had decided she was going to be on a maternity leave until October at the earliest or January at the latest. While she took steps at the commencement of her pregnancy to register for day care, she did nothing to alter those plans

when she was advised she did not qualify for an extension to the original maternity leave. She was on her own "trajectory" which did not include returning to work before she was ready.

This was not a case of someone who, despite her best efforts, could not find day care for her child and had to make a choice between her child or her job. The Complainant had decided that the only acceptable day care was provided through a regulated day care facility. She was unwilling to accept less. While that was her choice, it does not follow that the right to be accommodated arises simply on the basis of her individual assessment of what was best for her child. In this case, in any event, there was no rigid application of a rule that adversely affected the Complainant. If there was a rule or expectation that an employee would return to work when her leave of absence expired, the Respondent indicated their willingness to be flexible by allowing her several extensions to the first deadline. None of those extensions were enough because they did not meet the Complainant's needs to the extent she desired. Their flexibility was met each time with a rigid and unbending response; "I cannot come back on that date because I do not have adequate day care".

In summary, the Complainant was not discriminated against on the basis of family status. She was denied a final extension of her maternity leave because she refused to return to work until she satisfied her own personal preference for day care.

5. PROBATIONARY PERIOD

The Complainant's alleges she was discriminated against when the Respondent imposed a longer period of probation because she was absent for a pregnancy related illness. The Respondent's position is that it was not unusual to extend the probationary period for the length of an absence that occurred during the probationary period. There was, however, no explanation given for the fact that the Complainant's probationary period was extended for a longer period than her actual absence and no explanation or reasons given for the later decision to reduce it to six months. In the circumstances it is difficult to decide with certainty what motives drove the Respondent. At the time the Complainant was advised about the extension of her probationary period, there had

been complaints about the quality and quantity of her work. She was in the hospital and was expected to be off work until her delivery date. Ms. Smith recommended, consistent with the policy or practice at the time, that her probationary period be extended for four to six months after her return to work. Memos to the Clerk from Ms. Schoenberger and Mr. Land set out the background to the Complainant's concerns including references to her refusal to sign the leave forms, and her failure to keep them notified about her progress. The Clerk, after discussions with Ms. Smith and Mr. Land decided to extend her probationary period for a year from the date of her return. One can only assume that the Clerk's decision was based, in part, on events that occurred after the Complainant advised them she was pregnant and culminating in the disputes concerning maternity and sick leave benefits. In my view it is impossible to ignore the fact that the decision by the Clerk to extend her probationary period beyond the time recommended by her direct supervisor was inconsistent with the practice at the Legislative Assembly. The Complainant was treated in a discriminatory manner vis-a-vis other employees on a prohibited ground which is contrary to the *Code*.

6. THE COMPLAINANT'S START DATE

There was an assertion by the Commission that the Complainant actually started on March 9, 1987, when she attended an orientation session with a group of new employees. This assertion, however, was raised for the first time just before the hearing commenced. The Complainant was never paid for that day and, throughout the entire event she, and everyone else involved in the process, accepted as a fact a start date of March 16, 1987. That is actually the day the Complainant began her job with the Legislative Assembly.

7. MATERNITY LEAVE

The next issue to be determined is whether the Respondent discriminated against the Complainant when they denied her request for maternity leave. The Manual of Administration clearly stated that, in order to be eligible for maternity leave an employee had to have completed a year of service. Depending on how the calculations were made, the Complainant was four to six days shy of that one year service requirement. The Commission specifically assured the Board that it was

not taking issue with the threshold requirement in the *Employment Standards Act* or the policy itself or suggesting that it was contrary to the *Code*. There is therefore no argument about direct discrimination. As I understand the Commission's argument, the Respondent's strictly adhered to that policy without any consideration of accommodating the Complainant to allow her to meet the terms of the policy. There was no evidence from the Respondent that the service requirement was a *bona fide* occupational requirement or necessary for business reasons and their refusal to accommodate her by exercising their discretion to grant her maternity benefits was a breach of their duty under the *Code*. The Speaker and the Board of Internal Economy could have given her a leave of absence with pay so as to allow her to reach her anniversary date. It could have granted her special compassionate leave.

The Respondent, on the other hand, assert that all employees of the Legislative Assembly are entitled to maternity leave irrespective of their service. It is only women who have one year of service who are entitled to paid maternity leave and an extended maternity leave. In any event, they argue, if the Commission does not take issue with or challenge the service requirement under the *Employment Standards Act* as being contrary to the *Code*, it cannot claim that the policy of the Legislative Assembly is contrary to the *Code*. Once the Commission concedes a service requirement is acceptable under the *Code*, the length of that requirement is irrelevant.

That position is, in my view, the inevitable conclusion of the Commission's argument. If the Commission concedes that a threshold service requirement is acceptable under the *Code*, the issue of the length of that threshold is irrelevant. The policy of the Legislative Assembly concerning maternity leave did not therefore directly discriminate against the Complainant on a prohibited ground.

The Commission alleges, however, that the failure of the Legislative Assembly to exercise its discretion to grant the Complainant maternity leave benefits regardless of her service was a violation of the Complainant's rights under the *Code*. The problem with that argument, however, is that, even if the Legislative Assembly was required and failed to exercise its discretion to grant

the Complainant the leave required, the Commission has not pointed to a prohibited ground under the *Code* that was violated by their actions. Again, once the threshold service requirement of the policy is accepted as lawful, it cannot be said that the application of that policy is unlawful. The generally accepted definition of indirect or adverse effect discrimination is found in the *O'Malley v. Simpsons-Sears* case at page D/3106, para 24772:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here". There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the *Act*. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force. For essentially the reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the *Code* I am of the opinion that this Court may consider adverse effect discrimination as described as a contravention of the *Code*. An employment rule honestly made for sound economic or business reasons, equally applicable to to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply...

Applying the facts of this case to that definition, the rule or standard at issue is the requirement for a years' service for eligibility for maternity leave benefits. While the rule specifically applies to pregnant women, there is no argument that it constitutes direct discrimination. That rule applies equally to all of the employees it was intended to apply to, that is pregnant women. If the rule specifically applies to an identified group under the *Code* and is accepted as placing penalties or restrictive conditions on that group that are allowed under the *Code*, how can it be said that the application of the rule to that group is contrary to the *Code*. This Board is not asked to determine whether the Respondent's were unreasonable in their decision to deny maternity benefits to the Complainant. Neither was it asked to decide whether it exercised its discretion in a reasonable

manner. Its task is to determine whether the Respondent contravened the *Code* when it applied its rule or standard concerning maternity leave benefits and, based on the evidence and submissions of the parties, the Commission has failed to prove its allegations.

CONCLUSIONS

The allegations of the Complainant that she was discriminated against on the grounds of family status are dismissed. The Complainant was given certain time limits within which she was expected to return to work. She ignored those time limits and proceeded on her own return to work schedule based on her original requests for time off. Her efforts to obtain child care within her employer's time frames were, at best, inadequate, at least, non-existent.

Her allegation concerning the denial of sick leave benefits from January 4 to March 10, 1988, have been substantiated. The sick leave provisions of the policy were applied unequally to pregnant women in that, except for pregnancy women, all other employees were eligible for benefits after twenty days of service and were denied to pregnant women for pregnancy related illness. The Legislative Assembly, once it had received a current legal opinion on the policy, acted promptly to amend its discriminatory aspects, including paying to the Complainant the sick pay due her under the policy.

The allegations of harassment are dismissed. The Complainant has testified that, in her opinion, the harassment began as early as September of 1987 and did not cease until her termination in the fall of 1988. Much of her perceived harassment was more a function of her own state of mind than fact. She never asked for any special consideration from Ms. Smith or Dr. Gardner but felt aggrieved because they did not intuitively understand her needs. Even if their efforts were, in the end, ineffectual in relieving the Complainant's stress at the time, they cannot be held responsible for that fact in the circumstances. The Complainant also believed she was being harassed by Ms. Scotland and Ms. Schoenberger while she was in the hospital. Again, neither of them were aware of the effect of their contact with the Complainant. In the circumstances, they had no way of knowing that the Complainant felt harassed by them. In any event, their actions were not intended

to harass. They were merely trying to perform their duties according to their standard practices. They could not have known that their conduct in this case was being perceived by the Complainant in such a negative way. They were adhering to a policy that applied equally to all employees and did not have an adverse effect on any group or individuals on a prohibited ground. It did have a unique or unusual effect on the Complainant personally but that is not a violation of the Complainant's rights under the *Code*. Finally, the Complainant's allegations that she was harassed about returning to work are dismissed. As was stated before, in this case, the Complainant was given several extensions to her maternity leave to allow her to secure day care. Her efforts were wanting and she must take the responsibility for that. In all of these situations she interpreted the Respondent's' actions as harassment and ignored the fact that they were necessitated by her own refusal to comply with their requests.

The allegations that she was discriminated against because of the denial of sick leave for a period of time following her delivery date are dismissed. The Respondent cannot be held liable for the failure to grant something they were never asked for in the first instance.

Similarly, the suggestion that the Complainant actually started at the Legislative Assembly on March 9, 1987 is rejected. Up until the hearing everyone, including the Complainant, proceeded on the assumption that her start date was March 16, 1987. She was not paid for the orientation on March 9, 1987 and all of the documents, including her contract of employment, cited March 16, 1987 as her first day of work.

Much evidence was offered about the Legislative Assembly's concerns about the partisan nature of the Complainant's conduct during this time. Because of my findings with respect to the other allegations, I do not need to consider this issue as it relates to reinstatement. Nevertheless, I feel constrained to state that, in my view, the Respondent's concerns are not without merit. The Complainant did contact several members of the Provincial Parliament about her employment problems. To be fair, it would appear she approached members for all of the provincial political parties. However, having sought the help of so many of them could raise reasonable concerns

that their perception of her might have been affected. As well, it is my opinion that the Complainant deliberately misled the Respondent during her hiring interview and, once her past affiliation with the NDP party was known, it would have reasonably raised concerns in the Respondents' minds about her ability to do research in an unbiased and non-partisan manner.

The Complainant was discriminated against when her probationary period was extended for a year. The evidence was that the usual practice was to extend it for the length of the absence. The recommendation of her direct supervisor was consistent with that practice. For reasons that could not or would not be explained to the Board, her probationary period was extended for a longer time than the practice would have allowed. Because there was no apparent reason for the extension, the only conclusion one could reach is that it was for reasons related to her pregnancy.

REMEDY

There have been two separate breaches of the *Code*; one concerning the denial of sick leave benefits from January 4 to March 10, 1988 and one concerning the extension of the probationary period. The sick leave benefits were ultimately paid to the Complainant and no damages are owing for this breach. The only issue remaining is whether, in these circumstances, the Complainant is entitled to damages for mental anguish, loss of dignity or self respect. There is no doubt that the denial of sick benefits caused the Complainant unnecessary stress at a time when she least needed or could tolerate it. Had she been granted sick leave at the time, there would have been no need to press her to complete the leave of absence forms and one source of her perceived harassment would have been eliminated. The time she spent in the hospital would have been free of financial concerns as well.

The Complainant was discriminated against when her probationary period was extended for a year. Although she never actually had to serve that probationary period because of her termination, it caused additional stress and tension during an already difficult time.

In the circumstances, notwithstanding the fact that the Legislative Assembly did ultimately recognise her legitimate claim for sick leave and reduced her probationary period to a time

consistent with the practice, the Complainant is entitled to an award of $1000.00 as general damages for the stress she suffered as a result of the breach.

Dated at Toronto this 13th day of July, 1998:

Loretta Mikus
Adjudicator